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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a justiciable controversy on Respondents' facial challenge to a long-term federal land use plan (the Forest Plan for the Wayne National Forest), where that Plan does not provide authority to engage in any ground-disturbing activity?

2. If jurisdiction exists, did the Court of Appeals err on the following merits issues:

a. Does the Forest Service's adherence to Acts of Congress constitute judicially remediable bias?

b. Does the National Forest Management Act in general, and 16 U.S.C. 1604(g)(3)(F)(v) in particular, prohibit one of the two basic systems of forest management -- even-aged management of tree stands -- in national forests except in "exceptional circumstances," and require that timber production be limited to protect and preserve primitive recreational experiences?

PARTIES TO THE PROCEEDINGS

Petitioner Ohio Forestry Association, Inc. was an appellee before the court of appeals, and an intervening defendant at the district court level. The Chief of the United States Forest Service within the Department of Agriculture (then Jack Ward Thomas and currently Mike Dombeck) was the lead appellee before the court of appeals and lead defendant at the district court level. The other named defendants, who were appellees in the court of appeals, are also Department of Agriculture officials: the Secretary of Agriculture (then Mike Espy and currently Dan Glickman), the Regional Forester for the Eastern Region (then Floyd J. Marita and currently Robert A. Jacobs), and the Forest Supervisor for the Wayne National Forest (then Eurial E. Turner and currently the Acting Forest Supervisor is Jose Zambrana). The Sierra Club and the Citizens Council on Conservation and Environmental Control were the appellants before the court of appeals and plaintiffs at the district court level.

The names of the current federal officials have been substituted pursuant to Rule 33. Pursuant to Rule 29.6, Petitioner states that the Ohio Forestry Association, Inc. has no parent or subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

The Ohio Forestry Association, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The January 21, 1997 opinion of the Sixth Circuit Court of Appeals reversing the grant of summary judgment to defendants is reprinted at App. A and is reported at 105 F.3d 248. The April 7, 1997 order of the Sixth Circuit, denying rehearing and rehearing *en banc* is reprinted at App. F. The March 11, 1994 opinion of the district court granting summary judgment in favor of defendants is reprinted at App. B and is reported at 845 F. Supp. 485. The district court's opinion excluding evidence going beyond the administrative record is reprinted at App. C. The 1990 and 1992 administrative appeal decisions affirming the legality of the Wayne National Forest Plan are reprinted at Apps. D and E, respectively.

JURISDICTION

The court below entered its opinion and judgment on January 21, 1997. Petitioner timely sought a panel rehearing and rehearing *en banc* on March 3, 1997. This Petition is being filed within 90 days after the April 7, 1997 denial of

rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the United States Constitution, and of the National Forest Management Act and other National Forest System laws, are reprinted in App. H.

STATEMENT OF THE CASE

This case concerns the justiciability of a facial challenge to a forest plan and, if jurisdiction exists, merits issues on management of the National Forest System.

1. The National Forest System comprises over 188 million acres of federal lands. *See* 16 U.S.C. 1609; 36 C.F.R. 200.2 to .3. The System is managed by the United States Forest Service, an agency within the Department of Agriculture. Under the 1897 Organic Administration Act, "[n]o national forest shall be established, except . . . for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. 475.

The Multiple-Use Sustained-Yield Act of 1960 ("MUSYA") states the "policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. The broadened multiple uses were not to be exercised "in derogation of" the purposes expressed in 16 U.S.C. "section 475." *Id.* Thus, timber production remains one of the primary purposes for national forests, and multiple uses such as recreation are "*secondary*" to those purposes. *United States v. New Mexico*, 438 U.S. 696, 707-15 (1978). "[S]ustained yield" means achievement of "a high-level annual

or regular periodic output of the various renewable resources" -- for example, by timber sales. 16 U.S.C. 531(b).

2. The National Forest Management Act of 1976 ("NFMA") created a duty to prepare a "land and resource management plan" ("LRMP" or "forest plan") for each national forest or group of national forests. 16 U.S.C. 1604(a). The NFMA reaffirmed the multiple use mandate for national forests. A forest plan must "provide for multiple use and sustained yield of the products" (*e.g.*, timber products) from the national forest "in accordance with the Multiple-Use Sustained-Yield Act." *Id.* § 1604(e)(1).

3. The 36 C.F.R. Part 219 regulations explain forest planning (§§ 219.10 to .12) and provide direction on particular resources (§§ 219.13 to .27). In general, before a forest plan is adopted, demand for the various resources is assessed, public comments are solicited, and draft and final environmental impact statements ("EISs") describing alternative forest plans are prepared under the National Environmental Policy Act ("NEPA").

A forest plan can remain in effect for 10 to 15 years, after which it is replaced by a revised forest plan. 16 U.S.C. 1604(f)(5); 36 C.F.R. 219.10(g). Thus, a forest plan provides long-term planning direction.

Typically, a forest plan and accompanying documentation do not analyze, contain final decisions on, or authorize any specific project in a national forest. After the forest plan is adopted, a ground-disturbing project (such as a timber sale) that is consistent with a forest plan may be proposed, analyzed under NEPA and other laws, and approved by the Forest Service. Adoption of a forest plan does not dictate the occurrence of, nor serve as the final authorization for, any

ground-disturbing project (and its environmental impacts and injuries). The Eighth Circuit summarized the Forest Service's position on the relationship between forest planning and later site-specific projects, in concluding that Article III standing is lacking on a facial challenge to a forest plan:

> A forest plan, such as the Ouachita Forest Plan, is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action causing environmental injury must occur. Indeed, before an environmental change can come about, several events must transpire. First, a site-specific action (*e.g.*, a timber sale) must be proposed and found to be consistent with the Plan. Next, the action is subject to NEPA and NFMA analysis and public comment. Finally, the Forest Service must adopt the action. Finding an environmental injury based on the Plan alone, without reference to a particular site-specific action, would "take[] us into the area of speculation and conjecture."

Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994); *see* App. 18a, 75a, 87a-88a; Michael J. Gippert and Vincent L. DeWitte, *The Nature Of Land And Resource Management Planning Under The National Forest Management Act*, 3 ENVTL. LAWYER 149, 155-59, 166-69, 183-86 (Sept. 1996).

A forest plan allocates lands to specific management areas, each of which identifies a particular mix of possible uses (*e.g.*, a management area featuring primitive recreation and other compatible uses), and determines which lands are suitable for timber production. A forest plan also provides the minimum management prescriptions that constrain future development

proposals within each management area. *See id.*; 16 U.S.C. 1604(f)(1) and (2); 36 C.F.R. 219.11, 219.14.

4. This approach to forest planning was followed for the then-177,701 acre Wayne National Forest in Ohio. App. 12a-13a. The draft and final EISs analyzed seven alternative forest plans, including alternatives that emphasized primitive recreation and de-emphasized timber production.[1] The final Wayne Forest Plan was adopted in January 1988. It represents the mix of multiple uses that the Forest Service believed provided the greatest net public benefits. *See* JA 971-75; App. 12a-13a, 71a.

5. In 1988, the Sierra Club and the Citizens Council on Conservation and Environmental Control ("Plaintiffs") filed administrative appeals challenging the Plan. The Wayne Forest Plan was affirmed in decisions dated November 14, 1990 and January 14, 1992. Apps. D and E.

6. Plaintiffs then brought facial challenges to the Wayne Forest Plan and its final EIS in a Complaint filed on March 18, 1992. The actions that Plaintiffs challenged in their Complaint, and alleged caused them injury, were the adoption of the Wayne Forest Plan and the issuance of the final EIS on the Plan. App. G. Plaintiffs did not bring an "as-applied" challenge -- for example, by alleging that the Plan as applied in a particular proposed timber sale injured Plaintiffs.

The case was assigned to District Judge Graham of the United States District Court for the Southern District of Ohio. Petitioner was granted defendant-intervenor status on

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[1] At the Sixth Circuit level, pertinent excerpts from the administrative record were collected in a Joint Appendix ("JA"). The Draft EIS pages describing the alternatives begin at JA 528.

September 4, 1992. JA 4. Judge Graham dismissed Plaintiffs' claims on the merits in a 39-page summary judgment opinion dated March 11, 1994. App. B.

7. Plaintiffs appealed to the Sixth Circuit. The appeal was briefed and argued in the 1994-95 time period, but was not decided until January 21, 1997. App. A.

8. The panel opinion by Chief Judge Martin rejected the Department of Justice's position that there was no standing or ripe controversy on this facial challenge to a forest plan. App. 3a-4a. While the panel cited the Seventh and Ninth Circuit opinions that found justiciable controversies in analogous circumstances, the panel did not cite, or refute the logic of, the Eighth and Eleventh Circuit opinions finding that no justiciable controversy exists at the abstract level of a forest plan. *See* pages 8-9, below.

9. The panel then issued several unusual rulings on the merits without citing a single supporting case. Nor did the opinion below analyze the structure or legislative history of the statutes being construed, or support factual assertions with citations to the administrative record. *See* App. 5a-8a.

10. One unusual ruling was that Acts of Congress render the Forest Service unlawfully biased in favor of timber production. Judge Batchelder wrote separately because she did "not believe that the majority's undocumented broadside against the Forest Service is appropriate." App. 9a.

11. The other merits rulings were interpretations of the NFMA. The NFMA, in 16 U.S.C. 1604(g)(3)(F)(v), directs the Forest Service to issue regulations which:

> (F) insure that clearcutting, seed tree cutting, and shelterwood cutting, and other cuts designed to regenerate

> an even-aged stand of timber will be used as a cutting method on National Forest System lands only where - . . . . (v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

a. The panel interpreted this NFMA provision to mean that "even-aged management techniques will be used only in exceptional circumstances." App. 6a. This interpretation had been expressly rejected in a Fifth Circuit opinion cited by the parties, but not addressed by the court below. *Sierra Club v. Espy*, 38 F.3d 792, 799-800 (5th Cir. 1994) (the "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances").[2]

b. Finally, the court below ruled the NFMA creates a strong "protective spirit" for the "recreational value of wilderness" and that the Wayne Forest Plan is "in excess of the statutory limitations provided in § 1604(g)(3)(F)(v)." App. 6a, 8a. The panel seemed to conclude that the NFMA requires the preservation of primitive recreation first and permits timber harvesting only as a secondary matter. This view of NFMA "protection" also had been rejected in the *Sierra Club v. Espy*, 38 F.3d at 800-03.

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[2] As one commentator has noted, a "squarer conflict on a fundamental issue of forest management is harder to fathom." Somewhat "astonishingly, the Sixth Circuit in *Sierra Club v. Thomas* never discusses or even cites to the Fifth Circuit's earlier ruling. Nor for that matter, does the Sixth Circuit discuss or even cite to the Eighth Circuit's ruling on standing, from which the Sixth Circuit was also dissenting." Richard Lazarus, *Forestry Advance, Wetlands Retreat*, THE ENVTL. FORUM, March/April 1997, at 10.

12. The Forest Service and the Ohio Forestry Association, Inc. timely sought rehearing and rehearing *en banc*. Those requests were denied on April 7, 1997. App. F.

REASONS FOR GRANTING THE WRIT

The facial challenge to this Forest Plan did not create a justiciable controversy. Lacking facts on how the Forest Plan would be implemented, the court below misinterpreted the Plan and the National Forest Management Act. To bolster its decision, the court below impugned the integrity of an entire federal agency. The Court should grant the writ to resolve the well-developed split among five circuit courts on the justiciability issue. If jurisdiction exists, three significant and recurring merits issues, which also produce circuit splits or raise constitutional issues, warrant review.

I. Review Should Be Granted On The Justiciability Issue To Resolve The Split Among Five Circuits,To Address Constitutional Limitations, And For Other Reasons

1. The Court's guidance on the justiciability of facial challenges to forest plans is needed to resolve a well-developed split in the circuits. Five courts of appeal have considered this issue. They have split three-to-two.

The courts finding an Article III case or controversy at the abstract level of a forest plan are the Sixth Circuit in the decision under review; the Seventh Circuit in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); and the Ninth Circuit in the 2-1 decision in *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992) and its progeny. The Eighth and Eleventh Circuits have found that a facial challenge to a forest plan presents no justiciable controversy. *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996) (no ripe controversy);

Sierra Club v. Robertson, 28 F.3d 753, 757-60 (8th Cir. 1994) (no Article III standing).[3]

The conflict is well illustrated by a comparison of the claims in this case and the Eleventh Circuit case. *See* App. 13a-47a; 867 F. Supp. at 1033-35. The two cases share virtually identical legal claims, yet the courts reached opposite conclusions on justiciability.

2. The conflicting lower court opinions and law review commentaries[4] fully air the competing legal and policy rationales, but no consensus has emerged. The sheer number of decisions and articles demonstrates that the justiciability of facial challenges to forest plans is an important and recurring issue. The Court should resolve the well-ventilated justiciability issue presented by this Petition and avoid perpetuation of the legal uncertainty.

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[3] Several district courts also have found that there is no justiciable controversy in this situation. *See Wilderness Soc'y v. Alcock*, 867 F. Supp. 1026 (N.D. Ga. 1994), *aff'd*, 83 F.3d 386 (11th Cir. 1996); *Resources Ltd., Inc. v. Robertson*, 789 F. Supp. 1529 (D. Mont. 1991), *rev'd on standing, but aff'd on NFMA merits*, 35 F.3d 1300 (9th Cir. 1994); *Idaho Conservation League v. Mumma*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 20666 (D. Mont. 1990), *rev'd on standing, but aff'd on merits*, 956 F.2d 1508 (9th Cir. 1992).

[4] *E.g.*, Gippert, 3 ENVTL. LAWYER 149 (1996); Beth Brennan and Matt Clifford, *Standing, Ripeness, and Forest Plan Appeals*, 17 PUB. LAND L. REV. 125 (1996); Note, *Failing to See the Forest For the Trees: Standing To Challenge National Forest Management Plans*, 16 VA. ENVTL. L.J. 145 (1996); Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223 (1996); Note, *Loss of Protection As Injury in Fact: An Approach to Establishing Standing to Challenge Environmental Planning Decisions*, 29 U. MICH. J.L. REFORM 857 (1996).

a. As one example of the conflict in legal rationales, the Sixth, Seventh, and Ninth Circuits have reasoned that facial challenges to forest plans should be allowed because forest plans "play a critical role in future Forest Service actions." App. 4a; *accord Mumma*, 956 F.2d at 1515-16. A forest plan's role is that it influences, but does not dictate, later ground-disturbing actions (*e.g.*, a timber sale). *See* pages 3-4, above. The Eighth Circuit has concluded that the logic of the Ninth Circuit "may be no longer viable" in light of Supreme Court precedents (discussed below) that a contingent risk of injury does not confer standing, "even though the Ninth Circuit has continued to rely upon it." *Sierra Club v. Robertson*, 28 F.3d at 760; *see* Martha Colhoun and Timothy S. Hamill, *Environmental Standing in the Ninth Circuit: Wading Through the Quagmire*, 15 PUBLIC LAND L. REV. 249, 257-65, 279-80 (1994).

b. Another rationale invoked by the court below and the Ninth Circuit (in allowing facial challenges) is that plan-level challenges "would forever escape review" unless facial challenges are permitted. App. 4a. The Seventh, Eighth and Eleventh Circuits have found this reasoning unpersuasive. Once a proposed timber sale creates the immediate and certain environmental injury required for standing and the concrete factual situation required for a ripe controversy, plaintiffs "can challenge both the site-specific action as well as the Plan-level decisions underlying the specific action at the second [timber sale] stage." *Wilderness Soc'y*, 83 F.3d at 390; *see Marita*, 46 F.3d at 613-14 n.5; *Robertson*, 28 F.3d at 759. Thus, a plan-level challenge can be presented when an injury is imminent, in a concrete "as-applied" setting.

3. The opinion below also conflicts with this Court's precedents on the constitutional minima for standing and on

ripe controversies. Federal courts must presume that they lack Article III jurisdiction until a plaintiff proves otherwise. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). The decision below has an *ipse dixit* quality that jurisdiction should exist because the court would like to review the forest plan.

The disputed action in a facial challenge (adoption of a forest plan) typically does not cause any imminent environmental injury or any such injury at all. *See* pages 3-4, above. Accordingly, Plaintiffs lack the "*imminent*" and "*certainly* impending" injury required for Article III standing when they challenge a forest plan in isolation from any timber sale or other ground-disturbing activity that injures their environmental interests. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564-65 & n.2 (1992) (emphasis in original). Plaintiffs are not "immediately in danger of sustaining some direct injury as a result of the challenged" action. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). While a forest plan creates a risk of "future injury contingent" on the later analysis and approval of a timber sale in an area where Plaintiffs' members recreate, such a contingent risk of injury does "not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Constitutional and prudential ripeness principles suggest that judicial review not occur in the factual vacuum of a facial challenge to a forest plan. There, it is not certain how a forest plan will be implemented, and the plan can be misconstrued (as we believe the Sixth Circuit misconstrued the Plan at issue here). The NFMA does not provide for judicial review at the abstract level of a forest plan. Review normally should wait until the "scope of the controversy 'has been reduced to more

manageable proportions, and its factual components fleshed out, by some concrete action.'"[5]

Bennett v. Spear, 117 S. Ct. 1154 (1997), does not alter this analysis. *Bennett*'s discussion of Art. III standing repeated the *Defenders of Wildlife* requirements for a "concrete" and "imminent" injury-in-fact. *Id.* at 1163. While the *Bennett* Court found that an Art. III injury could be fairly traced to the challenged biological opinion since it "alters the legal regime" by providing an immediately effective "permit authorizing the action agency to 'take' the endangered" species, the aspects of the forest plan challenged here lack such imminent and self-implementing effects. *Id.* at 1165; *see* pages 3-4, above. Additionally, *Bennett*'s conclusions on the factual presumptions that apply at the pleading or motion to dismiss stage have no bearing on the legal standing issues at summary judgment presented by this Petition. *Id.* at 1164. And, if *Bennett* does create legal uncertainty, this provides another reason to grant the Petition and clarify the law in this case.

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[5] *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990); *accord Renne v. Geary*, 501 U.S. 312, 320-23 (1991); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-75 (1982); *Wilderness Soc'y*, 83 F.3d at 390-91. Here, Plaintiffs' key complaints were that the Forest Plan designated 70% of the Wayne National Forest as being suitable for timber production, *see* 36 C.F.R. 219.14, and disclosed that some of the timber sales would be below-cost. *See* App. G. As the inclusion of lands in the suitable land base does not dictate that any timber sales occur on any of those lands, the designation on paper in the Forest Plan may not cause environmental injury-in-fact. Plaintiffs could raise more focused legal claims if a below-cost timber sale is proposed in an area which Plaintiffs believe must be preserved for primitive recreation.

4. Settling the justiciability issue at this time is of utmost importance. The Court's opinion would provide an answer shortly before the next generation of forest plans is litigated.

Forest plans last for 10 to 15 years, after which they are superseded by revised forest plans. *See* page 3, above. Most of the first generation of forest plans required by the NFMA were adopted from 1982 to 1988. The revision process has begun or will begin shortly on many of these forest plans. Over the next five years, 81 revised forest plans are scheduled to be released.

If the past is prologue, many (if not most) of the revised forest plans will be challenged in court. This Court's ruling here would provide guidance on whether facial challenges to forest plans are justiciable, or whether judicial review should await the more concrete setting of a forest plan "as applied" and implemented through a particular ground-disturbing action.

Accordingly, determining the justiciability issue in this case would be timely, both to resolve a well-developed split among five circuits and to provide direction on judicial review of the next generation of forest plans.

II. If Jurisdiction Exists, Review Should Extend To Three Significant Merits Rulings Which Also Involve Circuit Splits Or Constitutional Limitations

As described above, Petitioner is of the view that the Petition should be granted and this Court should reverse on jurisdictional grounds. But, if jurisdiction is found to exist, the Court should reverse on the merits. At this stage, the writ of certiorari should extend to the questions presented on the merits. Three merits issues deserve scrutiny because they present constitutional issues and circuit conflicts on issues of fundamental importance for the National Forest System.

A. The Forest Service Bias Ruling

1. The court below held the Forest Service is biased in favor of timber production. App. 5a-8a. The panel apparently used the bias conclusion to negate the "presumption of good faith and regularity" usually associated with agency decisions and, thus, to diminish the deference paid to the Forest Service's judgments. *Id.* Judge Batchelder wrote separately to disassociate herself from the "majority's largely undocumented broadside against the Forest Service." App. 9a.

2. Three of the four bias rationales offered by the court below are of an institutional nature that would infect all Forest Service decisions. One rationale was that, because 16 U.S.C. 475 refers to "ensur[ing] a reliable timber supply, the Forest Service has a history of preferring timber production to other uses." App. 7a. The second rationale was that, because 16 U.S.C. 500 directs "sharing of timber proceeds with the communities" surrounding a national forest, "the Forest Service becomes trapped" to issue timber sales as "[r]ural constituencies may provoke politicians to place pressure on the Forest Service to sustain that revenue." *Id.* The third rationale was that the "Forest Service budgeting process, which allows the Forest Service to keep a percentage of the funds it realizes from timber sales [pursuant to 16 U.S.C. 576-576d], provides an incentive for the Forest Service to sell timber below cost or at a loss." *Id.* In effect, the court below held that an *agency's adherence to Acts of Congress constitutes judicially remediable bias*. This remarkable holding deserves review by this Court for several reasons.

a. Any suggestion of unlawful bias in favor of timber production makes no sense in light of *United States v. New Mexico*, 438 U.S. 696 (1978). There, the Court held that the primary purposes of the National Forest System are to

"conserve the water flows, and to furnish a continuous supply of timber" -- the "*secondary* purposes" of "recreation, range, and 'fish'" protection are "'to be supplemental to, but not in derogation of'" the primary purposes. 438 U.S. at 707, 714-15, *quoting* 16 U.S.C. 528. Since Congress *intended* that national forests be managed for timber production, the Forest Service does not act unlawfully when it follows the congressional ordering of multiple use priorities.[6]

b. The court below's view that the Forest Service's adherence to statutes constitutes judicially remediable bias shows disrespect for two co-equal branches of government and presents significant *constitutional* issues.

A fundamental aspect of the separation of powers is that, when an agency states its reasoning in writing, a court can only review that reasoning during the record review allowed by 5 U.S.C. 706. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1986); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 41-43 (1983). If a court can find that a statutory framework renders an agency institutionally biased and that this allows a court to disregard the agency's stated reasoning, this would undermine basic respect for coordinate branches of government. That

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[6] There is a "presumption to which administrative agencies are entitled - that they will act properly and according to law." *FCC v. Schreiber*, 381 U.S. 279, 286 (1965). This presumption continues to apply when the Forest Service disburses revenues as provided by statute. And, since the NFMA and MUSYA delegate to the Forest Service (and not to the courts) the responsibility for making trade-offs among often-conflicting multiple uses, the panel erred in imposing its preference for the "recreational value of wilderness" on the expert agency and the public. App. 6a; *see* page 22, below.

extraordinary proposition warrants this Court's careful scrutiny.

The separation of powers prevents courts from becoming "continuing monitors of the wisdom and soundness of Executive action," as the court below has done in questioning the wisdom of timber production. *Laird v. Tatum*, 408 U.S. 1, 15 (1972).[7] Courts cannot engage in correction of agency action absent a constitutional or statutory violation, which is missing in the bias charge of the court below. *See Defenders of Wildlife*, 504 U.S. at 576-77; *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 556-58 (1978).

Further, a court cannot override *congressional* direction on the management of public lands without violating the Property Clause (Art. IV, § 3).

> The power of the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." [*Light v. United States*, 220 U.S. 523, 537 (1911).] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

United States v. San Francisco, 310 U.S. 16, 29-30 (1940); *see Kleppe v. New Mexico*, 426 U.S. 529 (1976).

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[7] To illustrate why courts should not become monitors, development interests could use the logic of the court below to argue that the National Park Service is unlawfully biased in favor of preservation due to the conservation mandate for national parks in 16 U.S.C. 1 and to the agency's retention of visitor use fees.

c. The Court should undertake supervisory review because the precedents created by the court below unfairly impugn the integrity of an entire agency and compromise the agency's mission. The Sixth Circuit's decision now provides a credible basis for enjoining virtually any Forest Service land use planning decision that could be construed as favoring timber production or any decision authorizing a timber sale. According to the court below, the institutional "biases undermine[] even the facial neutrality of the National Forest Management Act" so as to render such decisions unlawful. App. 8a.

3. The Court also should review the Wayne National Forest "example of bias" that Wayne planners "arbitrarily undervalu[ed] the recreational value of wilderness." App. 6a. This bias claim is factually disproven by the administrative record (which the court below declined to even cite, contrary to 5 U.S.C. 706), and the claim lacks legal support.[8]

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[8] The Draft and Final EISs analyzed seven alternative forest plans. Alternative 7 emphasized primitive recreation, and alternatives 3 and 4 emphasized dispersed recreation and uneven-aged management. *See* Draft EIS at vi-ix and Chapter 2; JA 528-71; App. 38a-40a. The selected Plan provides natural and primitive recreation on over half of the then-177,701 acre national forest. *See* Wayne Forest Plan at 4-63 to 181 (describing Management Areas 2.1, 2.2, 6.1, 6.2, 6.3, and 8.1 (comprising 42,201 acres); primitive recreation can occur on a portion the 57,736 acre MA 3.3 as well). Thus, no bias against primitive recreation is apparent in the scope of alternatives considered, or in the selected Plan.

If the court below was second-guessing the dollar values the Forest Service assigned to unpriced commodities (primitive or dispersed recreation and developed recreation), it should have deferred to the agency's expert opinion on this disputed technical

(continued...)

B. The Two NFMA Rulings

1. The court below reached two interpretations of the NFMA, and of 16 U.S.C. 1604(g)(3)(F)(v) in particular, which create conflicts in the circuits and which would fundamentally alter the management of national forests.

2. The panel interpreted the NFMA to be a stringent constraint on the timber harvesting techniques (clearcutting, seed-tree cutting, and shelterwood cutting) that produce an even-aged tree stand. "[E]ven-aged management techniques will be used only in exceptional circumstances" -- the techniques must be the "exception," rather than the "rule." App. 6a. The Court should review this NFMA interpretation for the following reasons.

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[8](...continued)
issue. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *see Mumma*, 956 F.2d at 1522 ("we are not in a position to prefer ICL's view of the FS's software over the" economic inputs employed by the Forest Service); *Thomas v. Peterson*, 753 F.2d 754, 762 (9th Cir. 1985); App. 41a-42a (other dismissals of recreational value issues). Further, since a higher dollar value was assigned to primitive or dispersed recreation than to developed recreation, *see* Draft EIS at B4-13, JA 690, this undercuts the claim that the values were biased. Most importantly, the dollar value debate seems to be harmless error, not "prejudicial error," because it did not affect the final decision. 5 U.S.C. 706. The alternative chosen as the Wayne Forest Plan did not have the highest present net value and, instead, was structured to provide greater primitive recreation. *See* Final EIS at 2-8 and Record of Decision at 28-29; JA 824 and 972-73; 123a-124a. And, if the panel's real objection was to "below-cost sales" (App. 7a), the legal answer is that the NFMA permits below-cost timber sales and does not require profit maximization. *See* 16 U.S.C. 1604(g)(3)(E)(iv) and (k); *Resources Ltd.*, 789 F. Supp. at 1538; *Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 988 (D. Colo. 1989); App. 30a-37a, 68a-69a.

a. The panel's view conflicts directly with *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994). The Fifth Circuit there held the "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances." 38 F.3d at 800.[9] The panel's view that even-aged management may be employed only in "exceptional circumstances" also conflicts with the Ninth Circuit's conclusion that the NFMA and NEPA were not violated when "no Plan alternative allocates less than 75% of harvest to even-aged cutting" and with other decisions and statutes.[10]

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[9] The Sixth Circuit's views on "exceptional circumstances," on preservation of natural values, and on Forest Service bias (and even much of the language employed in the opinion) are the same views a district court expressed in the Texas National Forest case, *Sierra Club v. Espy*, 822 F. Supp. 356, 361-65 (E.D. Tex. 1993). However, the Fifth Circuit reversed in an opinion which explains why the Forest Service has considerable land management discretion under the NFMA. 38 F.3d 792. The Sixth Circuit essentially adopted, *sub silentio*, the Texas district court's discredited views without mentioning the Fifth Circuit's opinion or rebutting its logic.

[10] *E.g., Resources Ltd.*, 35 F.3d at 1307, *aff'g*, 789 F. Supp. at 1538; *see also Sierra Club v. Robertson*, 784 F. Supp. 593, 611 (W.D. Ark. 1991) (a court cannot "substitute its discretion for that of the Forest Service in order to halt even-aged management"), *aff'd*, 28 F.3d 753, 757 (8th Cir. 1994). The Fifth Circuit has found that the NFMA, instead of largely prohibiting even-aged management, represents a "congressional decision to permit clearcutting in national forests." *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201, 210 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978).

For several years, appropriations acts have limited "clearcutting in hardwood stands in the Wayne National Forest" to "25 percent of the fiscal year 1989 harvested volume." *E.g.*, FY 1997 Omnibus Appropriations Act, 110 Stat. 3009-208 (1996). This suggests that

(continued...)

b. This circuit conflict concerns a "fundamental issue of forest management." Lazarus, THE ENVTL. FORUM, March/April 1997, at 10. There are two basic systems for the silvicultural management of a stand of trees. One is the even-aged management system, where most trees are of the same age-class, though normally not the same species.[11] The other is uneven-aged management, where trees are of different age-classes. *See* 36 C.F.R. 219.3.

If even-aged management is allowed only in "exceptional circumstances," the Forest Service would be largely precluded from employing one of the two principal forms of scientific forest management. As the district court adverted to, allowing only uneven-aged management "would result in its own form of monoculture: a dark high-canopy forest in which only shade tolerant species can survive." App. 24a. Thus, the Court should grant the Petition because a general ban on even-aged

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[10](...continued)
Congress did not so limit clearcutting in the NFMA. Forest Service statistics show that less than 1500 acres of the 177,701-acre Wayne National Forest have been clearcut since 1988. Thus, the court below misconstrued the Wayne Forest Plan in concluding that it caused widespread clearcutting. This illustrates why judicial review should not be conducted at the generalized level of a forest plan.

[11] Even-aged stands of trees are created naturally by fires, windstorms, and pest infestations. Humans replicate even-aged stands through timber harvesting techniques that cut most of the timber in one or two cycles. 16 U.S.C. 1604(g)(3)(F). Some valuable tree species are shade-intolerant (they grow best in the sunny conditions after even-aged cuts), and some wildlife species depend on the browse habitats in young even-aged stands. *See Sierra Club v. Espy*, 38 F.3d at 802; *Resources Ltd.*, 35 F.3d at 1307; *Sierra Club v. Robertson*, 784 F. Supp. at 608-09; App. 6a (private even-aged timber stands provide "an abundance of diverse plant and animal life").

management has profound implications for the 188 million-acre National Forest System.

3. The court below also ruled that NFMA creates a strong "protective spirit" for the "recreational value of wilderness" and found that the Wayne Forest Plan is "in excess of the statutory limitations provided in § 1604(g)(3)(F)(v)." App. 6a, 8a. The Sixth Circuit seemed to reason that the NFMA requires the preservation of primitive recreational values first, and that timber harvesting is secondary.

a. This view of the priorities among multiple uses inverts the priorities discussed in *United States v. New Mexico*, 438 U.S. at 708-15. *See* pages 14-15, above.

b. Additionally, this aspect of the opinion below warrants review because it creates conflicts with circuit court opinions in several areas. The Fifth Circuit held that § 1604(g)(3)(F)(v) "does not mandate status quo protection" of recreational or biotic resources -- "protection means something less than preservation of the status quo" and the appropriate level of protection is a "policy-oriented decision Congress wisely left to the discretion of the experts - here the Forest Service." *Sierra Club v. Espy*, 38 F.3d at 800.[12]

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[12] "[N]ational forests, unlike the national parks, are not wholly dedicated to recreational and environmental values." *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 448 (7th Cir. 1990). "So long as Congress requires this Forest to be managed with multiple-use principles, portions of the Forest must embody a compromise between 'natural' Forest conditions and the need for Forest resources" like timber. *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1119 (W.D. Va. 1994), *aff'd*, 61 F.3d 900 (4th Cir. 1995); *see Citizens for Envtl. Quality*, 731 F. Supp. at 984.

Other appellate courts have found the Forest Service is the agency "charged with managing the ever-changing resources of the national forests" and that a court should "defer to the agency's determination" of the appropriate "trade-offs" among conflicting multiple uses.[13] In this important sense, the Sixth Circuit's notion that it could freely override the expert agency's decision on the desired mix of multiple uses is inconsistent with the deferential review of an agency's interpretation of a statute it administers in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and its progeny -- and with the deferential review of an agency's policy decisions under cases like *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2418 (1995).

c. Allowing a court to substitute its preference for wilderness-type management of national forests has broad significance. It compromises the Forest Service's land use discretion under MUSYA and the NFMA.[14] It compromises

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[13] *Sierra Club v. Espy*, 38 F.3d at 801-02; *see Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (Forest Service land allocation decisions "breathe discretion at every pore"); *Big Hole Ranchers Ass'n, Inc. v. United States Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988) ("the Forest Service has wide discretion to weigh and decide the proper uses within each area").

[14] The opinion below is binding within the Sixth Circuit. Since rehearing *en banc* has been denied, there are no prospects for relief in that court. The opinion below constrains management of millions of acres within the Daniel Boone National Forest in Kentucky; the Hiawatha, Huron-Manistee, and Ottawa National Forests in Michigan; the Wayne National Forest in Ohio; and the Cherokee National Forest in Tennessee. *See* 36 C.F.R. 200.2. The holdings on Forest Service institutional bias and on the NFMA provide credible grounds to (continued...)

the timber production purpose that 16 U.S.C. 475 sets for the National Forest System, thereby reducing the domestic timber supply and causing economic injuries to consumers of forest products and to forest product companies and their employees. Since there are reasons to believe that this judicially-imposed shift in land management philosophy is legally unauthorized, the Court's discretionary review is warranted.

4. As the above-cited cases indicate, the NFMA is a frequent source of litigation. The Court's guidance on the two NFMA issues would bring desirable uniformity and certainty to this area of law.

5. Finally, the Court should entertain review of the NFMA issues to ensure that Congress's *real* intent is not side-tracked. As Senator Hubert Humphrey stated in describing the NFMA conference report, the NFMA "is designed to get the practice of forestry out of the courts and back to the forests." 122 Cong. Rec. 33835 (Sept. 30, 1976).

The Court can fulfill that intent by granting the Petition and finding that this facial challenge to a forest plan presents no justiciable controversy for the courts. Alternatively, the Court could find, on the merits, that the significant constraints imposed on national forest management by the decision below are not authorized by the NFMA or by charges of bias.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14](...continued)
require additional forest planning in all these national forests, and to enjoin timber sales. Outside the Sixth Circuit, the opinion below may influence other courts to reach similar conclusions.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 94-3407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIERRA CLUB, *et al.*,
Plaintiffs-Appellants,

v.

JACK WARD THOMAS, *et al.*,
Defendants-Appellees,

OHIO FORESTRY ASSOCIATION, INC.,
Intervening Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 21, 1997

Before: MARTIN, Chief Judge; BATCHELDER, Circuit Judge; COOK, District Judge.*

MARTIN, C. J., delivered the opinion of the court, in which COOK, D. J., joined. BATCHELDER, J. (p. 8), delivered a separate concurring opinion.

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* The Honorable Julian A. Cook, United States District Judge for the Southern District of Michigan, sitting by designation.

BOYCE F. MARTIN, JR., Chief Judge. The Sierra Club and Citizens Council on Conservation and Environmental Control appeal the district court's order granting summary judgment to Jack Ward Thomas, Chief of the United States Forest Service, and officials of the United States Forest Service, pursuant to the district court's review of the Land Resource Management Plan for the Wayne National Forest. For the reasons described below, we reverse and remand this matter to the district court for further proceedings consistent with this opinion.

In 1988, the regional forester for the Eastern Division of the United States Forest Service issued a decision, pursuant to the National Forest Management Act, adopting a ten-year plan for Ohio's Wayne National Forest. The plan designated 126,107 acres of the Wayne from which timber could be removed or cut. During the ten-year life of the plan, 7.5 million board feet of timber could be cut per year. The plan designated that eighty percent of all timbering techniques would be "even-aged management", a harvest technique aimed at creating a regeneration of trees which are essentially the same age. In almost all cases, the even-aged management contemplated clearcutting of the timber. Clearcutting involves the removal of all trees within areas ranging in size from fifteen to thirty acres, and is thus a very sensitive public issue.

The Sierra Club appealed the regional forester's decision to the chief of the Forest Service pursuant to the applicable regulations. In 1990, the chief of the Forest Service denied the Sierra Club's appeal and affirmed the plan. Pursuant to final agency action, the Sierra Club filed this action in the district court. Appealing the district court's order granting

summary judgment to the Forest Service, the Sierra Club argues that the Forest Service made arbitrary assumptions in the Wayne planning process that biased the plan toward timbering.

The National Forest Management Act was enacted as a direct result of congressional concern for Forest Service clearcutting practices and the dominant role timber production has historically played in Forest Service policies. Congress was concerned that, if left to its own essentially unbridled devices, the Forest Service would manage the national forests as mere monocultural "tree farms." Procedurally, the Act requires the Forest Service to develop Land and Resource Management Plans for the national forests. This formal planning process was designed to curtail agency discretion and to ensure forest preservation and productivity. Substantively, the Act Imposes extensive limitations on timber harvesting by restricting the use of clearcutting to situations in which clearcutting is the optimum method for harvesting.

First, we address the threshold issue of justiciability. The Forest Service claims that the Sierra Club lacks standing. To establish constitutional standing, a plaintiff first must first suffer an injury-in-fact that is (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the injury must be fairly traceable to the defendant's conduct. *Id.* at 560-61. Third, the injury must be redressable by the court. *Id.* at 561. In cases involving Land Resource Management Plans, the most controverted standing issue is whether the injury is imminent.

A plaintiff who seeks review of a Land Resource Management Plan must show that it will suffer personal harm as a result of the plan. We have long recognized that injury is not confined to economic injury; aesthetic and environmental injuries can be embraced by this definition of personal harm. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Land Resource Management Plans represent significant and concrete decisions that play a critical role in future Forest Service actions. "To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). If the Sierra Club was allowed to challenge the Forest Service plan only at the site-specific stage, then the meaningful citizen participation contemplated by the National Forest Management Act "would forever escape review." *Id.*

The district court concluded that the Sierra Club's challenge presented a ripe controversy. Closely related to the issue of standing, the ripeness doctrine exists to keep the judiciary from "entangling [itself] in abstract disagreements over administrative policies" by preventing premature adjudication. *Sierra Club v. Marita*, 46 F.3d 606, 614 (7th Cir. 1995)(quoting *Abbot Lab v. Gardner*, 387 U.S. 136, 148-49 (1967)). The Forest Service maintains that disputes over forest planning are not ripe for review until a site-specific action occurs. We agree with the district court. Plaintiffs need not wait to challenge a specific project when their grievance is with an overall plan.

Because we find that the Sierra Club's case is justiciable, we turn now to the merits. We give no particular deference to the

district court and directly review the administrative record as if we were the first reviewing court. *Schuck v. Frank*, 27 F.3d 194, 197 (6th Cir. 1994). While it is generally accepted that federal agencies are entitled to a presumption of good faith and regularity in arriving at their decisions, that presumption is not irrebuttable. We would be abdicating our Constitutional role were we simply to "rubber stamp" this complex agency decision rather than ensuring that such decision is in accord with clear congressional mandates. It is our role to see that important legislative purposes are not lost or misdirected in the vast hallways of the federal bureaucracy. Specifically, we must decide whether the Forest Service took a hard look at the relevant factors and reached a decision that was neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The Sierra Club contends that the even-aged logging agenda is illegal in that the Forest Service has not complied with the constraints on its choice of even-aged management techniques contained in the National Forest Management Act. In reviewing this record, we have carefully examined the conclusions drawn by the Forest Service to test for internal consistency and reasonableness. Although the Forest Service has the benefit of the presumption of good faith and regularity in agency action, we have attempted to ascertain whether the plan has been improperly skewed. We conclude that the planning process was improperly predisposed toward clearcutting. The resulting plan is arbitrary and capricious because it is based upon this artificial narrowing of options.

Although it would be impractical to set forth the details of the administrative record here, one example of bias is

particularly illustrative. The Forest Service argues that its even-aged management plan is based on evidence that timbering will provide new opportunities for recreation that will, in turn, preserve and enhance the diversity of plant and animal communities in the Wayne National Forest. Most recreation does not require timber harvesting, however. Further, as the Forest Service's own records reflect, the Wayne is surrounded by and intermingled with privately-held land which already contains an abundance of diverse plant and animal life. Timbering simply does not promote the kind of recreational activities that are in demand in the Wayne; in fact, recreation like fishing and hiking is harmed by clearcutting. The planners also failed to recognize that cutting is unlikely to stimulate new and valuable forms of recreation because much of the Wayne has already been cut or developed. In that particular environment, clearcutting loses its value.

The National Forest Management Act mandates that the Service ensure that even-aged management practices be used in the national forests only when "consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v). The National Forest Management Act thus contemplates that even-aged management techniques will be used only in exceptional circumstances. Yet, the defendants would utilize even-aged management logging as if it were the statutory rule, rather than the exception. By arbitrarily undervaluing the recreational value of wilderness, the Forest Service created a very distorted picture of the Wayne National Forest. Based on false premises such as these, the Forest Service improperly concluded that clearcutting was necessary.

It is not surprising that the Forest Service came to this conclusion. Created, in part, to ensure a reliable timber supply, the Forest Service has a history of preferring timber production to other uses. Rather than being a neutral process which determines how the national forests can best meet the needs of the American people, forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse. Because national forests are located near rural communities, foresters make management decisions to support perceived needs in the communities. By sharing timber proceeds with those communities, the Forest Service strengthens the link between timber sales and the livelihoods of local constituencies. *See*, Office of Technology Assessment, *Forest Service Planning: Accommodating Uses, Producing Outputs, and Sustaining Ecosystems* 46 (1992). The resulting dependency of these communities on timber production causes over-harvesting and destructive harvesting methods. The relationship of the Forest Service to the timber industry also constrains the Forest Service's planning freedom. Rural constituencies reliant on timber sale revenues may provoke politicians to place pressure on the Forest Service to sustain that revenue. Consequently, the Forest Service becomes trapped: cutting off timber sales would cause loss of employment and revenue in local communities but continued timber sales risk over-harvesting and below-cost sales.

The Forest Service budgeting process, which allows the Forest Service to keep a percentage of the funds it realizes from timber sales, provides an incentive for the Forest Service to sell timber below cost or at a loss. *See,* Randal O'Toole, *Reforming the Forest Service* 122 (1988). Also, to maximize

its budget, the Forest Service uses expensive timber management and reforestation techniques, such as clearcutting. *Id.* Again, conflicting interests lead to perverse results: clearcutting provides the Forest Service with a higher congressional subsidy because the Forest Service can request preparation and administrative costs. Consequently, decisions may be made, not because they are in the best interest of the American people but because they benefit the Forest Service's fiscal interest.

Each of these biases undermines even the facial neutrality of the National Forest Management Act. Even when there may be more valuable uses for the land, the above biases and constraints cause the Forest Service to manage primarily to maximize timber outputs.

The public nature of the planning process and the public's right to appeal timber sales were intended by Congress to be a check on the Forest Service's power and discretion. Judicial review of planning decisions is intended to be a further check. Accordingly, in light of our examination of the structure, legislative history, and purpose of the National Forest Management Act we find the Forest Service has failed to comply with the protective spirit of the National Forest Management Act. We further find that this non-compliance is an arbitrary act in excess of the statutory limitations provided in § 1604(g)(3)(F)(v). The Forest Service's planning process, therefore, was not in accordance with the law. Accordingly, we REVERSE the district court's order for summary judgment and REMAND this case to the district court for further proceedings consistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, concurring. I concur in this decision because I believe that the reasoning of the Seventh Circuit in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995) is the better approach to the issues of standing and ripeness in this matter,[1] and because I agree that the record before us supports a conclusion that the Forest Service has not complied with the mandates of the National Forest Service Management Act relative to even-aged management practices in adopting the Plan. I write separately because, while I, too, have serious questions and concerns about the management practices and policies of the Forest Service, I do not believe that the majority's largely undocumented broadside against the Forest Service is appropriate. The issue before us is simply whether the Plan was properly promulgated within the appropriate exercise of the agency's discretion and is therefore within the law. We conclude that it is not. Our speculation about the motives and biases of the Forest Service, even if accurate, is unnecessary, and therefore, ought not to be voiced in this opinion.

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[1] The Seventh Circuit's reasoning in concluding that the Sierra Club had standing and that the controversy was ripe for adjudication is essentially summed up by the court's conclusion that "[t]he Sierra Club is appealing the issuance of a final management plan which will, unless amended, direct Service management activities in [the national forests at issue.] ... The Sierra Club 'need not wait to challenge a specific project when their grievance is with an overall plan.'" *Marita*, 46 F.3d at 614 (citation omitted).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club, et al., [Filed March 11, 1994]
Plaintiffs,

vs. Case No. C2-92-249
JUDGE GRAHAM

F. Dale Robertson, et al.,
Defendants.

OPINION AND ORDER

The Sierra Club and Citizens Council on Conservation and Environmental Control ("Citizens Council"), plaintiffs herein, filed this action against Mike Espy, Secretary of Agriculture, and officials of the United States Forest Service.

Plaintiffs challenge the Land and Resource Management Plan ("the Plan") for the Wayne National Forest ("the Wayne") and the Final Environmental Impact Statement ("FEIS") for the Plan, alleging violations of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1601-1614, the Multiple-Use Sustained Yield Act ("MUSYA"), 16 U.S.C. § 528 et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. This action is brought under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. This matter is now before the Court on the parties' cross-motions for summary judgment.

STANDARD OF REVIEW

Review of final agency action under NEPA and NFMA is governed by the APA, which directs a reviewing court to affirm final agency action unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The ultimate standard of review is a narrow one, and the court is not empowered to substitute its judgment for that of the agency, but instead it is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. at 416.

While the agency's decisions are entitled to a presumption of regularity, that presumption does not shield them from a thorough, probing review. Druid Hills Civic Ass'n v. Federal Highway Administration, 772 F.2d 700, 714 (11th Cir. 1985). In reviewing NEPA compliance, the role of the court is to ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision is not arbitrary or capricious. Communities, Inc. v. Busey, 956 F.2d 619, 623 (6th Cir. 1992) (quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98 (1983)). Where a statute is ambiguous, review is limited to determining whether the agency's interpretation is based on a permissible construction of the statute, and does not extend to matters of policy. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984). An agency's interpretation of its own regulations is binding on the court "unless it is plainly erroneous or inconsistent with the regulation." United States v. Larionoff, 431 U.S. 864, 872 (1977). Within the parameters of the applicable statutes and regulations, the management decision belongs to the agency, and should not be

second-guessed by a court. Texas Committee on Natural Resources v. Bergland, 573 F.2d 201, 210 (5th Cir.), cert. denied, 439 U.S. 966 (1978).

BACKGROUND

The Wayne National Forest is located in the unglaciated Appalachian Plateau of southeastern Ohio, commonly referred to as Ohio's Hill Country. It is bordered on the south by the Ohio River and includes three noncontiguous units located in the counties of Athens, Gallia, Hocking, Jackson, Lawrence, Monroe, Morgan, Perry, Scioto, Vinton and Washington. The gross area within the forest purchase units is 832,147 acres, of which 21% or 177,701 acres are now actually owned by the National Forest Service. There are many tracts of privately owned land intermingled with the Forest Service lands.

The management of the national forests is entrusted to the United States Department of Agriculture Forest Service. The NFMA requires the Forest Service to develop long-term plans for the management of national forests. Under NFMA and its regulations, the development of a forest management plan proceeds through a series of steps which ensure public involvement at each stage of the planning process. See 36 C.F.R. § 219.6, § 219.10, § 219.12. The first step is to identify the issues that the plan should address. Once that assessment is completed, several alternative management plans are constructed and each is subjected to an analysis of costs, benefits and environmental impacts, in accordance with NFMA and NEPA. After reviewing the environmental impacts and the cost benefit analysis, the Regional Forester for the administrative region in which the forest is located selects the alternative that in his opinion will "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public

benefits in an environmentally sound manner." 36 C.F.R. § 219.1(a). The approved plan controls all activity within the forest for a ten-year to fifteen-year period.

The planning process for the Wayne began in 1981 and continued over a period of five years. In August, 1986, the Forest Service published the proposed Plan together with a draft environmental impact statement ("DEIS") and distributed them to the public for comment. On January 4, 1988, after analyzing over 1,500 written comments, the Forest Service adopted the final Plan accompanied by a record of decision ("ROD") and the FEIS.

Both plaintiffs participated extensively in the initial planning process and in the comment period following publication of the proposed Plan and the DEIS. Both plaintiffs appealed the decision to adopt the Plan. The Chief of the Forest Service issued decisions on November 14, 1990 and January 14, 1992 denying plaintiffs' appeals. Plaintiffs filed this action on March 18, 1992.

SELECTION OF SILVICULTURAL SYSTEMS AND TIMBER HARVEST METHODS

Under the Organic Act of 1897, a national forest may be established and administered only "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. In 1960, Congress enacted the MUSYA, which directed the Secretary of Agriculture to develop and administer the resources of the national forests "for multiple use and sustained yield of the several products and services obtained therefrom" including "recreation, range, timber, watershed and wildlife and fish"

with due consideration "to the relative values of the various resources" and in such a way that the "periodic output" of such resources be maintained "in perpetuity...without impairment of the productivity of the land." 16 U.S.C. §§ 528, 529, 531. The principles of the MUSYA were expressly incorporated into the statutory and regulatory scheme of the NFMA. Under 16 U.S.C. § 1604(e)(1), the Secretary, in developing plans for the National Forest System, must assure that they

> provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960...and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; ....

Inasmuch as one of plaintiffs' major objections to the Plan is its provision for timbering, it is appropriate to note that the harvesting of timber is and always has been one of the purposes of the National Forest System. The record of this case indicates that the harvesting of timber is also an important forest management tool.

Silviculture is that phase of forestry that deals with the establishment, development, reproduction and care of forest trees. Webster's Third New International Dictionary Unabridged, 1981. A silvicultural system is a management process whereby forests are tended, harvested, and replaced, resulting in a forest of distinctive form. 36 C.F.R. § 219.3. Systems are classified according to the method of carrying out the fellings that remove the mature crop and provide for regeneration, and according to the type of forest thereby produced. Id. In managing forest lands, there are two systems available: even-aged and uneven-aged. Plan,

Appendix, p. C-1. Even-aged management results in the creation of stands in which trees of essentially the same age grow together. DEIS, Appendix, p. E-7. Uneven-aged management seeks to maintain the growth of trees through a range of diameter or age classes. Id., p. E-28.

Within the even-aged system, there are three recognized harvest methods: clearcutting, shelterwood and seed tree. Plan, Appendix, p. C-1. With even-aged harvest methods, the intent is to maintain a mosaic of different-aged stands of manageable size of equal age. Id., p. C-3. The seed tree method involves harvesting all but a few well-distributed trees of the desired species to provide seed for natural regeneration. Id., p. C-4. Later, the seed trees themselves are harvested. In the shelterwood method, all trees are removed in a series of two or three cuts with the final cut being made after a sufficient amount of desirable reproduction has become established. Id. This method provides a partial cover which may benefit the growth of seedlings. The clearcut method involves the cutting of all trees, merchantable and unmerchantable, at one time. Regeneration develops from natural seeding and sprouting. Id.

Within the uneven-aged system, the harvest method is selection, either single-tree or group selection. Plan, Appendix, p. C-1. Single-tree selection entails the periodic removal of individual trees. Id., p. C-2. In the group selection method, group cuts, resembling small clear cuts, are made in a checkerboard pattern creating many small openings of one-half to two acres within the forest. Id., p. C-3.

Each silvicultural system and its respective harvest methods have advantages and disadvantages.[1] The selection of the appropriate system and harvest method depends upon the judgment of the forest planner, taking into consideration the circumstances of the forest or subparts thereof, the goals of the forest plan and all applicable statutory and regulatory mandates. Clearcutting may be chosen as the method to regenerate an even-aged stand of timber only where it is the "optimum method," and other cuts may be used if "appropriate, to meet the objectives and requirements of the relevant land management plan." 16 U.S.C. § 1604(g)(3)(F). Timber harvests must be "carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation and esthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v).

The Plan divides the Wayne into fifteen management areas, each of which has a management prescription. A management prescription consists of management practices selected and scheduled for application on a specific area to attain multiple use and other goals and objectives. 36 C.F.R. § 219.3. Each management prescription specifies the silvicultural systems and harvest methods to be applied.

The Plan provides for even-aged management on 80% of the suitable forest land and for uneven-aged management on the remaining 20%. ROD, p. 18. The Plan projects, but does not require, that over the course of a decade, 5,075 acres will be harvested under even-aged management and 2,760 acres will be harvested under uneven-aged management. Plan, p. 4-

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[1] For discussion of pros and cons of even-aged versus uneven-aged management, see DEIS, pp. 4-16 to 4-32.

180. The predominant even-aged management harvest method is clearcutting. Plaintiffs argue that the Forest Service has illegally and arbitrarily adopted even-aged management as the routine method of vegetative management. They argue that the Plan fails to address the environmental impacts of clearcutting at specific locations and that it fails to address the requirement of optimality of clearcutting on a site-specific basis. They argue against clearcutting on the grounds that it has numerous detrimental environmental impacts, including the building of temporary roads and hauling logs which affect soils and plant life, and that it changes water run-off, causes erosion and otherwise adversely impacts water resources and soil stability. They argue that the role of slopes and soil condition are critical to assessing the effects of clearcutting. They note that the forest is dominated by narrow ridges and valleys with slopes ranging from 15% to 80% and argue that the slopes and soil conditions present in the forest are not compatible with clearcutting. They object to the Plan's failure to address required mitigation techniques on a site-specific basis and attack as arbitrary the Plan's determination that slopes of 55% or higher are not accessible for purposes of logging.

A review of the Plan, the DEIS and the FEIS shows that all of these concerns were addressed by the Forest Service and that the applicable statutes and regulations provide for a further assessment of these concerns on a site-specific basis when the Forest Service proposes to pursue specific projects in the forest.

Plaintiffs contend that the Plan should specify in detail the proposed use of each and every acre of the forest. This is not required by the NFMA or NEPA, and in any event, it would be a practical impossibility in view of the fact that a general land use plan required over six years to complete.

The Plan is programmatic in nature. It does not propose any specific development. Implementation of the Plan occurs at a second stage when individual site-specific projects are proposed and assessed. Idaho Conservation League v. Mumma, 956 F.2d 1508, 1512 (9th Cir. 1992). The Forest Supervisor must ensure that all projects are consistent with the Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.11(e). Further NEPA analysis is required to evaluate the effects of a specific project and a range of alternative actions, including a "no action" alternative. 40 C.F.R. §§ 1502.14 (d), 1508.9 (b). In future environmental analyses, reference is made to the Plan, the FEIS and any subsequent environmental impact statements, a process known as "tiering." 40 C.F.R. § 1502.20. See Plan, p. 5-2. A detailed analysis of specific environmental impacts is not required when the agency has not yet proposed the specific project that may cause the impacts. Northern Alaska Environmental Center v. Lujan, 961 F.2d 886, 891 (9th Cir. 1992).

The Plan addresses the effects of timber harvesting on soil and water resources, the problem of slopes and roads and erosion mitigation techniques.

> Although not conducted specifically on the Wayne National Forest, research has repeatedly shown the effect of clearcutting on soil and water quality is normally within fully acceptable limits and may be less than would be associated with other methods of harvesting. The major potential for soil damage would be caused by improperly located log landings and logging roads. With appropriate mitigating measures as described in the standards and guidelines of the Forest Plan, pages 4-28 to 4-38, this will not be a major problem. Harvesting with well-

> planned, well-constructed, and well-maintained road systems will minimize soil erosion and channeling effect and will cause no real damage to water resources (Kochenderfer and Aubertin, 1975).

FEIS, p. 2-17. See also DEIS, pp. 3-2 to 3-3, 4-3 to 4-4, 4-49 to 4-50; DEIS, Appendix, p. B3-9. Plaintiffs have not shown that these general determinations are arbitrary or capricious. A more specific consideration of these matters is properly deferred until there is a proposal of a specific timber sale at a specific site.

The Plan provides for procedures to mitigate and prevent erosion and water pollution. See Plan, pp. 4-28 to 4-35. See also FEIS, p. 2-15 (discussing erosion and clearcutting). Plaintiffs criticize the Plan for not specifying when or at what specific location mitigation techniques are to be used and for failing to discuss the cost of mitigation techniques. However, the Plan contemplates that mitigation techniques will be addressed at the time of specific timber sales and that the costs of such techniques will be borne by the purchasers and enforced by the contract of sale. FEIS, p. 2-18. Thus, if the cost of mitigation renders a sale unprofitable presumably it will not occur and there is no need to address such costs in the Plan.

With regard to the selection of even-aged management and clearcutting as a harvest method, 16 U.S.C. § 1604(g)(3)(F)(i) requires the Secretary to promulgate regulations for the development of land management plans which must include guidelines which

> insure that clearcutting, seed tree cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method

> on National Forest System lands only where -- (i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan; ....

Pursuant to this statutory mandate, the Secretary has promulgated 36 C.F.R. § 219.27(b)(1), which requires that management prescriptions in a forest plan that include vegetative manipulation of tree cover for any purpose shall

> (1) Be best suited to the multiple-use goals established for the area with potential environmental, biological cultural resource, aesthetic, engineering, and economic impacts, as stated in the regional guides and forest plans, being considered in this determination; ....

As applied to clearcutting, the regulation requires that it be best suited to meet the requirements and objectives of the Plan. "Best suited" is synonymous with "optimal." Thus, the rule is consistent with the statute.

The Plan for the Wayne complies with the statute and the rule. In those management prescriptions which include clearcutting, there is a determination that clearcutting is the optimum method to meet the objectives and requirements of the Plan and the rationale for that determination is explained. See Plan, Appendix C. This determination will substantially affect future decisions and is ripe for review. Mumma, 956 F.2d at 1508. The reasons given for choosing clearcutting include the following:

> To obtain desirable natural regeneration in central hardwood-stands, clearcutting is the most effective method. Clearcutting normally

> results in more seedlings and new sprouts than any other harvest method. Where regeneration of oak and hickory is of primary importance, advance reproduction of these species is essential prior to harvesting the overstory. (Sander and Clark, 1971) Experience has also shown that other factors such as site quality, aspect and slope position affect the composition of natural regeneration. The oaks and hickories compete better on poor, dry sites with south and west exposure.
>
> Clearcutting is especially appropriate for stands where the residual trees would not be worth retaining for a future crop, when stands have had the best trees removed in past harvests, or in areas which have insufficient trees to adequately use growing space.
>
> * * *
>
> To maintain the present diversity of tree and animal species and high quality hardwoods on a sustained yield basis, it is necessary to use an even-aged system. The only methods applicable to the Forest are shelterwood and clearcut.
>
> The Eastern white pine plantations will be regenerated by the shelterwood method and will result in mixed pine-hardwood stands.
>
> Clearcutting is optimum to regenerate the yellow poplar type because it is the only method which provides sufficient light to achieve adequate stocking and growth of yellow poplar.
>
> The clearcut and shelterwood methods are both appropriate for the oak-hickory type. In stands

where the desired condition is the forest type and advance regeneration is not present in adequate numbers, shelterwood may be used in an attempt to increase the amount of desired advance regeneration. The use of shelterwood will probably be in conjunction with prescribed fire, understory control of undesired species, underplanting of oaks, or a combination of all these practices. Stands with a poorly stocked overstory or of low vigor are not shelterwood opportunities. These stands will be regenerated by clearcutting to retain oak and hickory as stand components.

Where oak-hickory regeneration is not a problem, clearcutting is optimum because: [7 specific reasons are given]

> In summary, where oak-hickory reproduction is not a problem, clearcutting is optimum. It offers more flexibility of location to manage timber for other purposes, higher revenues, lower costs, and less risk. In nearly all cases, clearcutting will regenerate as much, or more, oak than uneven-aged management by the group-selection method and more than would be regenerated using [a] single-tree selection method of management.

Plan, Appendix, pp. C-4 to C-7.

The FEIS further explains the rationale for choosing clearcutting in response to specific objections to the Plan's proposed vegetative management prescriptions. See FEIS, pp. 2-15 to 2-18 and 2-23.

> Many people believe that the long-term effects of clearcutting have not been adequately

> assessed. However, this harvesting method does, in fact, imitate nature. Natural clearcutting occurs as a result of wildfire, wind, insects and disease. We have had the opportunity to observe how Forests which succumb to these natural forces return to production. Knowledge gained from the exploitive land clearings a century ago and examining our current Forests, even-aged Forest, help us to understand the silvicultural benefits of clearcutting. Combined with the knowledge that many species of trees will not grow and reproduce well in uneven-aged Forests, this reassures us in our belief that even-aged management is the most appropriate on much of the Wayne National Forest.

FEIS, p. 2-18.

The FEIS also notes, at p. 2-23:

> Clearcutting is as much a sustained yield system as selection cutting, and results in areas which regenerate naturally, grow rapidly, and help ensure healthy future forests.
>
> Areas harvested by clearcutting regenerate rapidly and within 8 to 10 years are filled with regeneration 20 to 30 feet tall. By the time they are 20 years old, most people do not realize that they were even clearcut. At any time, the amount of the Forest with an "open canopy" from clearcutting will be less than 10 percent even in Management Areas 3.1 and 3.2. The open area greatly increases the capacity of the Forest to support some species of wildlife.

Plaintiffs' characterization of the consequences of even-aged management as producing monocultural "tree farms" is not supported by the record. The Plan indicates that regeneration after even-aged timber harvesting will be by natural means, not artificial planting. Plan, Appendix, p. C-4. Natural re-seeding will provide a diverse mixture of trees just as would occur after a forest fire or windstorm.

On the other hand, a plan which allowed no vegetative management would result in its own form of monoculture: a dark high-canopy forest in which only shade tolerant species can survive and in which valuable hardwood timber rots on the stump or on the ground. See Plan, Appendix, p. C-2; FEIS, p. 2-23; DEIS, p. 4-27.

The Plan limits clear cuts to a maximum size of 30 acres in management areas 3.1 and 3.2, 20 acres in management area 3.3 and 15 acres in management area 6.1. ROD, p. 17. The Plan incorporates standards and guidelines to lessen the visual impact of clearcutting, including the shape and location of openings, the retention of important vegetative features, road location and design and disposal of logging debris. ROD, p. 18. The Secretary's regulations require that when openings are created by the application of even-aged management, they "shall be shaped and blended with the natural terrain, to the extent practicable, to achieve aesthetic, wildlife habitat, or other objectives established in the plan." 36 C.F.R. § 219.27(d)(1). In response to public comments the number of acres proposed for even-aged management was reduced by 8,375 acres. ROD, p. 18.

Plaintiffs have failed to show that the choices of uneven-aged management as the predominate silvicultural system and of clearcutting as the predominate harvest method were arbitrary or unreasonable. In enacting 16 U.S.C. § 1604(g),

Congress considered the arguments for and against clearcutting in the National Forests and struck a delicate balance between two extremes. It chose not to prohibit clearcutting but to regulate it, leaving the technical management responsibility for the application of the NFMA guidelines on the Forest Service. "Within its parameters the management decision belongs to the agency and should not be second-guessed by a court." Bergland, 473 F.2d at 210.

The Plan determines that in certain management areas, clearcutting is the optimum harvest method to meet its objectives and requirements, but recognizes that there may be specific sites within those areas where clearcutting would not be appropriate. This would include sites where the slope or soil conditions are not conducive to clearcutting, or sites where soil or exposure is not conducive to oak-hickory regeneration. These matters, as well as the specific environmental impacts of a specific timbering project, will be addressed on a site-specific basis at the time of a proposed timber sale. While the Plan narrows the scope of future environmental analyses, an environmental analysis will be completed for each project which will focus on site-specific issues, alternatives and environmental consequences unique to the project. Plan, p. 5-2.

In ruling on the administrative appeal of the Sierra Club, the Chief of the Forest Service explained the relationship between the optimality determination contained in the Plan and site-specific issues which will be addressed on a project-by-project basis:

> The optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain

> areas of the forest to achieve specific management objectives. However the analysis and final decision on the appropriateness of even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

Decision Letter, Appeal No. 2309, Docket No. 2, Nov. 14, 1990, p.6.

Plaintiffs argue that under recently adopted Forest Service NEPA regulations, some timber sales will escape further review.[2] The regulation in question applies to timber sales of 250,000 board feet or less and is premised on the agency's judgment that sales in such small amounts would have no significant environmental impact. The validity of the regulation is not an issue before the Court. Although such sales are categorically exempted from environmental analysis when the Forest Service determines that no extraordinary circumstances exist, the decision to proceed must be documented and interested and affected persons must be notified and they have the right to appeal. 36 C.F.R. § 217.3. The court is not persuaded that this regulation renders any determination made in the Plan unreasonable or arbitrary.

Plaintiffs argue that there is no justification to allow any significant timbering on the Wayne and support this argument in part with the assertion that "for some years timbering has been almost entirely forbidden in the Hoosier National Forest" which until recently was jointly administered with the Wayne. Plaintiffs' Revised Motion for Summary Judgment, p. 24.

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[2] Federal Register, Vol. 57, No. 182, § 31.2.

There is nothing in the record to support this assertion.[3] The Hoosier National Forest is 250 miles from the Wayne in another state, and there is nothing in the record of this case which would support an argument that decisions reached there would be relevant to this Court's consideration of the Plan for the Wayne. To exclude timbering in favor of other uses would be a violation of the MUSYA and would deprive the Forest Service a valuable forest management device.

ALLOCATION OF LANDS THAT ARE UNSUITABLE FOR TIMBER PRODUCTION

Title 16, U.S.C. § 1604(k) provides in part as follows:

> In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary,...

Lands so identified are generally exempt from timber harvesting for a period of ten years. Id.

Plaintiffs claim that the Forest Service failed to designate sufficient physically unsuitable land, failed to adequately assess the availability, cost and effectiveness of mitigation measures necessary to prevent irreversible damage and failed to adequately analyze the impacts of the Plan on water resources.

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[3] After oral argument on the cross-motions for summary judgment, counsel for defendants filed a copy of the April 8, 1991 ROD for the Land and Resource Management Plan Amendment for the Hoosier National Forest which provides for a timber harvest of up to 4.4 million board feet per year.

In order to implement the mandate of 16 U.S.C. § 1604(k), the Secretary adopted 36 C.F.R. § 3219.14, which provides the criteria for identifying lands which are not suited for timber production. The criteria for physical unsuitability are: (1) the land is not forest land[4]; (2) technology is not available to ensure timber production from the land without irreversible resource damage to soil productivity or watershed conditions; (3) there is not reasonable assurance that such lands can be adequately restocked; and (4) the land has been withdrawn from timber production by an act of Congress, the Secretary of Agriculture, or the Chief of the Forest Service. 36 C.F.R. § 219.14(a)(1)-(4).

The forest planners found that available technology could ensure timber production on 169,215 acres of the Wayne without irreversible resource damage to soils productivity, or watershed conditions. Plan, p. 4-7; DEIS Appendix, pp. B3-B37. The Plan contemplates that the effects of timber harvesting will be controlled by the design of timber sale areas using standards and guidelines that will adequately protect these resources. See Plan, pp. 4-28 to 4-38 and Appendix F; FEIS, p. 2-17. The Plan identifies the technology to be used in preventing irreversible damage and provides for its implementation. See Citizens for Environmental Quality v. United States, 731 F. Supp. 970, 985 (D. Colo. 1989). The Plan's standards and guidelines generally limit roads to slopes no greater than 35%, provide soil sensitivity standards for various logging activities, and require watershed protection measures such as filter strips in which no earth-disturbing

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[4] Forest land is defined generally as land which is at least 10% occupied by forest trees. See 36 C.F.R. § 219.3.

activities will occur unless special techniques are used to minimize potential detrimental effects. Id. As noted above, a separate environmental analysis will be conducted at the time of any proposed timber sale. The forest planners concluded that available techniques would control soil and watershed impacts from timber harvesting to the point of insignificance. DEIS, p. 4-3, Table 4-1. Plaintiffs have not shown that this determination was arbitrary or capricious.

The Court rejects the plaintiffs' claim that the forest planners were required to estimate the cost of available technology in order to determine if it is "available" within the meaning of 36 C.F.R. § 219.14(a)(2). Plaintiffs' reliance on Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) is misplaced. Robertson involved a special use permit authorizing the development of a major ski resort in the Okanogan National Forest, not a programmatic plan for the entire forest. The cost of mitigation measures is site-specific. The cost of mitigation measures is borne by the purchaser. FEIS, p. 2-18. If the cost of required mitigation measures at any specific site renders the timber sale unprofitable, then it is safe to assume that it will not occur. The Forest Service's interpretation of 36 C.F.R. § 219.14(a)(2) is not plainly erroneous or inconsistent with the regulation. Larionoff, 431 U.S. at 872.

Plaintiffs claim that the record "is totally lacking in any meaningful or adequate analysis of water quality related issues." Plaintiffs' Revised Motion For Summary Judgment. However, as noted earlier, the forest planners did consider the impact of timber harvesting on watershed quality and concluded that it would not cause irreversible resource damage. The Plan includes forest-wide guidelines and procedures for the protection of water and soil resources. See

Plan, Chapter 4. The DEIS describes the quality of the surface water in the forest and the types of pollutants that impact those waters. DEIS, p. 3-10. The DEIS also recognizes that water quality may be affected by timber harvesting and the development of recreation facilities, structures and roads. DEIS, p. 4-86. The Plan provides for the monitoring and evaluation of these management activities. Plan, p. 5-3. This level of documentation is adequate for a programmatic forest plan. Plaintiffs have asked the Court to revisit its ruling on the need for detailed information on such site-specific developments as the construction of a sewage treatment facility. See Memorandum Opinion and Order, March 8, 1993, p. 14. The Court will adhere to the position taken in its earlier order for the reasons stated therein. When a programmatic EIS is prepared, "site-specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development." California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). See also Lujan, 961 F.2d at 890-891.

Plaintiffs claim that in authorizing below-cost timber sales defendants have violated the economic suitability requirement of § 1604(k). They claim that defendants improperly allowed timber harvest levels to determine whether land was included in the suitable timber base. They argue that § 1604(k) requires that economically unsuitable land be identified and removed from the timber production base prior to the selection of harvest levels, and they assert that the Secretary's regulations on economic suitability are in conflict with § 1604(k).

Section 1604(k) does not impose a strict economic test for the suitability of timbering. The statute requires forest plans to identify lands which are not suitable for timber production considering economic "and other pertinent factors to the extent

feasible, as determined by the Secretary." Section 1604(k) does not identify the specific economic factors to be considered in determining which lands are not suited for timber production but leaves that to the determination of the Secretary. While § 1604(k) makes it clear that Congress intended economic factors to be a consideration in determining whether land is suitable for timber production, it is likewise clear that Congress did not require that economic factors alone should be determinative. The statute vests the Secretary with broad discretion to consider a variety of possibly conflicting factors in determining whether an area is suitable for timber production. Congress allowed the agency to choose its own method for balancing physical, economic and other considerations in determining the suitability of lands for timber production. Acting pursuant to this broad grant of discretion, the Secretary adopted criteria for economic unsuitability in 36 C.F.R. § 219.14.

Pursuant to 16 U.S.C. § 1604(h), the Secretary was required to appoint a committee of scientists to provide advice and counsel on the guidelines and procedures for land management plans. The committee concluded that § 1604(k) did not require timber sales to meet specific economic criteria, but implied congressional concern that timber harvesting should not take place where "by some rule of reason public benefits were less than production costs." 44 Fed. Reg. 26,630 (1979). The committee recommended cost benefit criteria to be applied before the development of plan alternatives. The Secretary adopted the committee's cost-benefit criteria, but chose to apply them as part of the planning process outlined in 36 C.F.R. § 219.14.

The regulation provides a two-stage analysis for economic suitability. The first stage, contained in 36 C.F.R.

§ 219.14(b), determines the financial costs and economic benefits of a proposed management prescription. The second stage is a flexible analysis which estimates the indeterminate values of non-economic benefits such as aesthetics and recreation. The goal of the two-stage analysis is to exclude lands for timber production if they are not "cost-efficient" in meeting the overall plan objectives. "Cost efficiency" includes consideration of both monetary and non-monetary costs and benefits. Under 36 C.F.R. § 219.14(c)(3), lands must be tentatively identified as not appropriate for timber production where the "lands are not cost-efficient, over the planning horizon, in meeting forest objectives, which include timber production."

Plaintiffs' argument that the statute precludes consideration of production goals as part of this determination is not well founded. See Citizens For Environmental Quality, 731 F. Supp. at 988. Plaintiffs' argument that the determination of economic suitability must occur before the development of plan alternatives likewise fails. It is within the Secretary's discretion to apply the economic suitability test at the planning stage.

The interpretation put on a statute by the agency charged with administering it is entitled to deference. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981). A court should follow the construction of a statute by those charged with its execution unless there are compelling indications that it is wrong. Michigan United Conservation Clubs v. Luian, 949 F.2d 202, 206 (6th Cir. 1991), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

The forest planners determined that the total net forest area was 176,787 acres. Of that area, 169,215 acres were

determined to be physically suitable for timber production. After applying the cost-efficiency analysis, another 43,108 acres were removed from the timber base leaving 126,107 acres as suitable for timber production. This is about 75% of the total net forest area. ROD, p. 19. This was a reduction from the previous plan which had identified 166,000 acres as suitable. ROD, pp. 18-19. The forest planners determined that the maximum allowable sale quantity (ASQ) would be 7.5 million board feet ("MMBF") per year, a reduction from 9.7 MMBF in the previous Plan. Id. The ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors, including the budget of the Forest Service, the market for wood products and other conditions which may limit the practicality of offering sales at levels developed in the Plan. Decision Letter, Appeal No. 2813, Docket No. 2, January 14, 1992, p. 9 (hereinafter "Citizens Council Appeal Decision"). See ROD, pp. 18-19. The ASQ of 7.5 MMBF is well below the estimated long-term sustained yield capacity of the forest and is only 40% of current timber industry demand. Id., ROD, p. 19. The Plan has a lower level of timber harvest than some of the alternatives considered. Id. There is no evidence that the forest planners gave undue weight to timber production goals in the suitability analysis or that they capitulated to timber industry interests.

The justification for below-cost sales is set forth in the ROD, p. 20-21, as follows:

> To accomplish the Plan's goals and the Forest's desired future condition requires treatment of the vegetation. Commercial timber harvest has traditionally been the preferred method to

manage vegetation through applied silviculture. Timber harvest is viewed as the most technically sound and least costly method of vegetative management.

* * *

[T]he overall timber sale program is expected to provide a positive cash revenue to the Forest. The cash revenue of below cost sales are less than the cost to the U.S. in preparing and administering the sales, plus the cost of road construction and reconstruction and reforestation. However, this approach to accounting was not used in the analysis of alternatives. The cost versus revenue approach ignores a fundamental principle that must be taken into account in evaluating the economics of the Forest Service's timber sale program. The Forest Service is required by law to manage the National Forests for multiple use. The real measure of the worth of the timber program is not costs versus revenues, but costs versus public benefits. This is the approach that was utilized in our analysis. Public benefits can be measured as receipts and as the dollar value of benefits for which revenues are not received, such as recreation. Unfortunately, some benefits are impossible to value in dollar terms or other readily quantifiable measures.

The treatment of vegetation through timber sales complements other uses of the Forest. For example, timber sales are often an effective means of improving or maintaining the visual quality on the Forest....Improved visual quality contributes to high quality dispersed recreation use in the long run. By providing for a variety

of tree species, age and size in timber stands, the Forest Service can achieve and maintain a forest less susceptible to insects and disease.

A variety of wildlife habitats are provided by a diversity of timber stand age classes and tree species. Timber sales are the most economically viable means of achieving desired plant and animal diversity. Our publics put high values on wildlife-associated recreation and the visual amenities of the Forest. If these benefits were provided through a method other than commercial timber sales, costs would be significantly higher and would eliminate returns to the Treasury. If the visual, wildlife, and recreation benefits were added to the returns to the Treasury, timber sale benefits would substantially exceed the costs.

See also DEIS, pp. 2-77 through 2-87. Plaintiffs have not shown that the cost benefit analysis supporting the planned timber sales in the Wayne was arbitrary or capricious.

Plaintiffs have made reference to the July 31, 1985 decision of Douglas W. MacCleery, Deputy Assistant Secretary of Agriculture, in the matter of the review of the administrative decision of the Chief of the Forest Service related to the administrative appeals of the Forest Plan and Environmental Impact Statements for the San Juan National Forest and the Grand Mesa, Uncompahgre, and Gunnison National Forests ("San Juan/GMUG").[5] The MacCleery decision found that the planning documents provided inadequate information on the

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[5] Sometimes referred to variously as the "MacCleery decision" or the "San Juan decision."

economic implications of continuing and increasing a timber sales program where costs substantially exceed revenues. In rejecting the plaintiffs' administrative appeals in the instant case, the Chief of the Forest Service found that the MacCleery decision did not apply to the Wayne because the Plan does not increase but decreases the timbering program. He also found that the planning documents for the Wayne did address many of the economic factors noted in the MacCleery decision. Citizens Council Appeal Decision, p. 7. The Court further notes that the MacCleery decision was based at least in part on concerns about the fact that the San Juan/GMUG plan reduced economic efficiency. Here, while the present net value of the Plan is 10% less than the former Plan, the decrease is attributed not to timber harvesting but to increases in semi-primitive recreation areas and uneven-aged management, which plaintiffs advocate. See DEIS, p. 2-97. It appears that the Chief of the Forest Service reasonably interpreted the MacCleery decision and his interpretation of the agency's prior ruling is entitled to deference. Furthermore, the Regional Forester has sufficiently explained why the Plan maximizes net public benefits even though it includes below-cost timber sales.

Plaintiffs claim that the forest planners allowed the fifth decade harvest level to dictate the timber base and that this violates the Secretary's suitability regulation. The Plan, Table 4-1, indicates that the fifth decade timber harvest level is a projection based on the increasing maturity of the forest over the next fifty years. See FEIS, p. 2-21. It is not apparent to the Court that this projected output controlled the planners' determination of the suitable timber base. Even if it did, the Court is not convinced that this would be arbitrary or capricious or contrary to the statutes or the regulations. The amount of suitable timber base does not represent the amount of timber which will be harvested. As noted above, the

amount of timber that can be harvested is limited by the ASQ and the actual amount harvested will be determined by budgets, market factors and other conditions. See infra, p. 24. If the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur. This approach seems consistent with the use of timber harvesting as a forest management tool.

CONSIDERATION OF A BROAD SET OF ALTERNATIVES

Plaintiffs argue that the alternatives proposed in the planning process did not present a broad set of alternatives for consideration and review as required by the applicable statutes and regulations. Plaintiffs specifically allege that the alternatives proposed did not present a sufficiently broad set of alternatives for the range of timber base, length of rotational period of timber harvests and the provision of semi-primitive recreation. None of these arguments were raised in plaintiffs' administrative appeal. The only objection raised there regarding an insufficient range of alternatives related to the forest road system. See Citizens Council Statement of Reasons, pp. 40-43; Citizens Council Appeal Decision, pp. 11, 12. Claims based upon issues which have not been addressed in the administrative appeal are barred. Cisternas-Estay v. Immigration and Naturalization Service, 531 F.2d 155 (3d Cir. 1976); Getty Oil Co. v. Clark, 614 F. Supp. 904, 921 (D. Wyo. 1985) (court may not consider contentions that were not presented in the administrative proceeding below). However, in the interest of judicial economy, the Court will nevertheless address the merits of these newly raised arguments.

Alternatives prepared for consideration in an Environmental Impact Statement ("EIS") are intended to provide a broad range of reasonable management scenarios for the various uses of the forest. See 36 C.F.R. § 219.12(f). "The primary goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements" of the NFMA regulations. Id. The purpose of a forest plan and supporting EIS is to develop overall guidance for management of all multiple-use resources. Citizens for Environmental Quality, 731 F. Supp. at 977. The alternatives are not intended to focus on specific outputs such as timber production or a specific form of recreation; instead, they are intended to "provide different ways to address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process." 36 C.F.R. § 219.12(f)(4). Seven alternative plans were considered. They are described in general in the DEIS as follows:

> Seven alternatives for development of a Land and Resource Management Plan for the Wayne National Forest in Ohio are described and evaluated in this Draft Environmental Impact Statement (DEIS). The alternatives respond to public issues and management concerns and provide for different levels of goods, services, and uses. The alternatives are: (1) continuation of current management; (2) emphasis on economic efficiency; (3) emphasis on a wide variety of vegetative conditions and recreation opportunities; (4) emphasis on uneven-aged silviculture; (5) emphasis on a balanced mix of even-aged and uneven-aged silviculture, early and late successional habitat, and recreational opportunities; (6) emphasis on early successional wildlife habitat and off-road vehicle use; and (7) emphasis on a low intensity of management.

DEIS, p. i.

The DEIS identified eleven major public benefits which were varied to provide a wide range of benefits. DEIS, p. 2-14. Other benefits that were not considered to be major issues were also varied. Id. The alternatives are described and compared in the DEIS. DEIS, pp. 2-20 to 2-62. In alternative 1, 97% of the forest is allocated to even-aged management with a mixture of 80-year and 120-year rotation. Alternative 2 assigns 97% of the forest to even-aged management with a 120-year rotation. In the case of alternative 3, which became the Plan, 18% of the forest is allocated to uneven-aged management, 30% is allocated to even-aged management with an 80-year rotation, 33% is allocated to even-aged management with a 120-year rotation and 15% is allocated to semi-primitive recreation with a mixture of even-aged management with a 120-year or 160-year rotation and natural forest with no timber harvest. In alternative 4, 93% of the forest is allocated to uneven-aged management. Alternative 5 allocates 42% of the forest to uneven-aged management, 40% to even-aged management with an 80-year rotation, and 25% to semi-primitive, non-motorized recreation with a mixture of even-aged management with a 120-year rotation and natural forest with no timber harvest. Alternative 6 assigns 72% of the forest to uneven-aged management with an 80-year rotation, and 25% to even-aged management. Alternative 7 is a low intensity management option with a timber base of only 15,588 acres, in which 75%

of the forest is assigned to even-aged management and 22% is assigned to semi-primitive non-motorized recreation with a mixture of even-aged management with a 120-year rotation and natural forest with no timber harvest. The amount of land classified as suitable timber land ranges from 17,878 acres in alternative 7 to 147,742 acres in alternative 6. DEIS, Appendix B, Table B3-9.

NEPA requires that the EIS set forth only those alternatives sufficient to permit a reasoned choice. Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974). NEPA does not require an agency to consider alternatives that do not achieve the purpose of the proposed action. Thus, the focus of the Court's inquiry is whether the agency adequately considered alternatives "reasonably related to the purposes of the project." Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588, 593 (9th Cir. 1988). The Court concludes that the alternatives described in the DEIS provide an adequate basis for identifying the alternative that comes nearest to maximizing public benefits, as required by NFMA regulations. The Court concludes that the Forest Service considered a reasonable range of alternatives as required by NEPA.

USE OF THE FORPLAN COMPUTER MODEL

Plaintiffs criticize the manner in which the forest planners used FORPLAN, a computer program designed for use in forest planning. The Court has reviewed plaintiffs' arguments regarding the use of FORPLAN but finds no support in the record for the conclusion that it resulted in any decisions which were arbitrary or unreasonable. Plaintiffs contend that arbitrary and capricious assumptions regarding the recreation values of timbering were input into the FORPLAN model which caused the program to assume that timbering was

necessary for recreation. They assert that this error can be demonstrated by studying the FORPLAN computer run of "Max PNV[6] market" and "Max PNV assigned." Plaintiffs dispute the forest planners' assumptions about recreation values, claiming that they overestimate the benefits to recreation from timbering. The DEIS indicates that recreation values used in the planning process were based upon the 1980 RPA National Assessment, a document compiled by the Secretary of Agriculture every ten years, which contains facts and analyses to develop and guide public and private forest and rangeland policies and programs. See DEIS, Appendix, p. B4-13 and Glossary. Recreation values developed at the regional level for the 1980 RPA Assessment were used to estimate the wildlife and recreation values used in the FORPLAN model. DEIS, Appendix, p. B4-13 and Table B4-6. There is nothing in the record to support plaintiffs' argument that these values are arbitrary and capricious. There is no evidence that they are based on inadequate research and analysis, or that their validity is otherwise undermined.

Plaintiffs object to the planners' failure to consider the greater value of semi-primitive non-motorized recreation in the Wayne because of the limited opportunity for such recreation in southeastern Ohio. However, the planners recognized that semi-primitive recreation in the Wayne should be valued

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[6] PNV or present net value is the difference between the dollar value of outputs resulting from management activities and the costs of those management activities, discounted to present value. See 36 C.F.R. § 219.3. NFMA regulations require the Forest Service to compute economic benchmarks for the PNV of outputs that have an established market price ("market PNV") such as timber and developed recreation and the PNV of outputs with an assigned market price (assigned PNV) such as dispersed recreation. 36 C.F.R. 219.12 (e)(1)(iii).

higher than indicated in National Willingness to Pay studies and included the difference in the category of non-priced benefits. See DEIS, Appendix, p. B4-17.

DIVERSITY

Plaintiffs argue that the Plan fails to provide for diversity of plant and animal communities as required by the NFMA and its regulations. They argue that clearcutting threatens wildlife diversity, and that proper consideration of diversity of plant and animal communities requires preservation of old growth and mature forest areas as opposed to early successional conditions which occur under even-aged management. Under 16 U.S.C. § 1604(g)(3)(B), the regulations for land use plans must:

> provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

The committee of scientists formed to advise the Secretary on the formulation of the NFMA guidelines concluded that it was impossible to write specific regulations which would provide for diversity. The scientists stated:

> Provision for "diversity" as required by NFMA is one of the most perplexing issues dealt with in the draft regulations. We believe it is

> impossible to write specific regulations to "provide for" diversity.

44 Fed. Reg. 26600-01. The regulation ultimately adopted by the Secretary, contained in 36 C.F.R. § 219.26, provides as follows:

> Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices. (Refer to § 219.27(g).)

The text of 36 C.F.R. § 219.27(g) provides in part:

> Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities...so that it is at least as great as that which would be expected in a natural forest and the diversity of tree species similar to that existing in the planning area. Reductions in diversity of plant and animal communities and tree species from that which would be expected in a natural forest or from that similar to the existing diversity in the planning area, may be prescribed only where needed to meet overall multiple-use objectives.

Although the natural forest is used in the regulations as one point of reference for evaluating diversity, the regulations do not imply that diversity can only be achieved by attempting to recreate the conditions of the natural forest.

The Secretary's regulations do not require the planners to use any particular method in their analysis of diversity; rather, they focus on the measurement of the impacts of the proposed management practices on the inventoried flora and fauna of the forest. They direct the Forest Service to select management indicator species of fish and wildlife to ensure viable populations of those species and to provide for research and monitoring. See 36 C.F.R. § 219.19. Pursuant to the regulations, the planners identified the principal habitat components of all plants and animals that occur in the Wayne. They then selected management indicator species for the Forest which would be representative species for all habitat types and conducted an inventory and analysis of the habitat requirements of these species. See Plan, Appendix B; DEIS, pp. 3-19 to 3-21 and Appendix C; FEIS, Appendix E. They did all of this with the assistance of several committees comprised of members of nine Ohio universities, officials of the Ohio Department of Natural Resources and biologists employed by the United States Fish and Wildlife Service. In addition, the planners identified "sensitive species" as a further means of maximizing bio-diversity. See Plan, p. 4-44; DEIS, p. 3-22. The Plan and the FEIS both set forth specific procedures and methods for monitoring and evaluating bio-diversity. See, e.g., Plan, pp. 5-1 to 5-13.

Plaintiffs argue that the Plan does not adequately consider the areas which surround the Wayne. The NFMA regulations expressly state that the diversity requirements apply "within the area covered by a land and resource management plan." 36

C.F.R. § 219.3. Under NFMA forest plans are to govern "units of the National Forest System." 16 U.S.C. § 1604(a). The Forest Service has the discretion to consider conditions surrounding the forest but it is not required to compensate for them in the Forest Plan. Here, the forest planners did consider the area surrounding the Wayne. See, e.g., DEIS, p. C-5; FEIS, pp. 2-24 to 2-29.

Plaintiffs criticize the Plan for failing to provide for bio-diversity by maintaining a natural forest environment. The Wayne, however, is not a natural forest. An estimated fifty percent of the original forest of southeastern Ohio was cleared by 1850. An almost complete removal of the remainder, as well as the second growth, occurred from 1850 to 1880 to fuel the native iron ore smelting industry which consumed all trees down to three to four inches in diameter. A second nearly complete removal of the second and third growth forests occurred again for the charcoal industry between 1880 and 1950. When the Forest Service began acquiring lands for a national forest in the middle 1930's, the Wayne consisted of previously cleared land consisting of a mixture of reverting old fields, eroded areas, and young cutover timber stands. DEIS, Appendix, p. C-3. At present, only nine percent of the Wayne consists of old growth forest. See DEIS, Appendix, Table C-1.

The Plan, however, does provide for the development of areas of mature growth within the forest. Management areas 3.3 and 6.1 specify a 120-year rotation. By the end of the fifth decade, almost 30% of the forest will consist of hardwood trees over 100 years old. DEIS, Table 4-30, p. 4-57; ROD, pp. 33-34; FEIS, pp. 2-28 to 2-49. More than 17,000 acres are allocated to old growth in area 6.2 where no timbering will occur. ROD, p. 15. An additional 4,000-plus acres of old

growth will occur in other management areas. Id. After 50 years there will be a total of 55,000 acres of late successional habitat. Id. The percentage of mature forest is increased over the life of the Plan. In response to public comment the area of old growth forest was increased by 6,030 acres. Id.

The planners considered the effects of various timber harvesting methods on forest diversity. See DEIS, pp. 4-18, 4-21. With respect to clearcutting, the FEIS, p. 2-17, states:

> Clearcutting is the method that can slow the change from oak-hickory to the more mesic mixed hardwoods that is presently occurring on the Forest because of natural forces. Oak and hickory are important to a variety of wildlife species on the Forest ....
>
> Forest stands of mixed species of trees resulting from clearcutting and changing climatic conditions may be more desirable than many existing stands. Research and diversity survey data have shown that regeneration following the clearcutting method exhibits a diversity of tree species at least as great as what would be expected in a natural forest or what exists today. These Forest stands will be more resistant to insect and disease attacks and provide greater utility for some wildlife.

The goal of diversity under the NFMA is "based on the suitability and capability of the specific land area" and is specifically linked to the "overall multiple-use objectives" of the land management plan. 16 U.S.C. § 1604(g)(3)(B). Diversity is not the controlling principle in forest planning, although it is an important goal to be pursued in the context of overall multiple-use objectives. The Court concludes that the Plan provides diversity of plant and animal communities while

balancing a mix of multiple uses. While the alternatives and mix of uses that the forest planners chose were not those favored by the plaintiffs, the Plan does meet the requirements of the applicable statutes and regulations, is well within the discretion vested in the Forest Service and is not arbitrary and capricious.

CONCLUSION

The Court concludes that in adopting the Plan for the Wayne, the Forest Service considered all of the relevant factors, and the Court is not persuaded that the Forest Service has committed any clear errors of judgment in adopting the Plan. Overton Park, 401 U.S. at 416. The Secretary's decision is entitled to a presumption of regularity. Id. at 415; Druid Hills Civic Association v. Federal Highway Administration, 772 F.2d 700, 714 (11th Cir. 1985). As the Court noted in Resources Limited, Inc. v. Robertson, 789 F. Supp. 1529, 1540 (D. Montana 1991), "the Forest Service is faced with a nearly impossible task of serving many different interests." Here, the agency, after considerable review, analysis and public involvement, chose an alternative which attempts to strike a reasonable balance between and among all of the competing uses. Plaintiffs disagree with the selected alternative but it is not for the courts to decide whether the decision was necessarily the best one or the one the Court would have chosen. Congress has vested the Forest Service with the discretion to make these decisions, and its decisions must be upheld by the courts unless they are arbitrary, capricious or contrary to law. Plaintiffs have failed to show that in adopting the Plan for the Wayne, the Forest Service acted arbitrarily or capriciously or that the Plan is contrary to law.

In accordance with the foregoing, defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied. The clerk shall enter final judgment in favor of the defendants dismissing plaintiffs' complaint with prejudice at plaintiffs' costs.

It is so ORDERED.

/s/James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: March 11, 1994

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club, et al.,	)	[Filed March 8, 1993]
	)	
Plaintiffs,	)	Civil Action No. C2-92-249
	)	
vs.	)	JUDGE GRAHAM
	)	MAGISTRATE JUDGE ABEL
F. Dale Robertson, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In this action, Plaintiffs challenge the Defendants' decision to adopt a long-term plan for the management of the Wayne National Forest ("WNF") and an accompanying environmental impacts statement, alleging violations of the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1601-1614, the Multiple Use Sustained Yield Act, 16 U.S.C. § 528 et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. This action is brought under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 1701 et seq.

In a preliminary pretrial conference held on September 9, 1992, Plaintiffs asserted the right to present expert testimony and requested an evidentiary hearing. Defendants objected on the ground that the Court's role should be limited to a review

of the agency's action, based upon the administrative record. Magistrate Judge Abel directed defendants to file a motion in limine addressing this issue and they did so on October 15, 1992. The intervenor, Ohio Forestry Association, Inc., filed a similar motion on the same date. Plaintiffs filed their rule that a court's review of administrative decisions is limited to the administrative record, citing Bradley v. United States, 26 Claims Court 699 (1992). This Court is not persuaded that NEPA cases are a special exception to the general rule, although it may well be that because of the issues involved in the usual NEPA case, courts may more often be inclined to invoke one of the recognized exceptions to the general rule. See Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988).

Plaintiffs principally rely on two recognized exceptions to the general rule, which permit the Court to consider evidence outside the record, when it is needed: (1) to explain agency action or; (2) when it is needed to clarify technical matters involved in the agency action. Plaintiffs contend that they should be permitted to offer additional evidence for the purposes of explaining or addressing technical or scientific issues involved in the administrative record and to identify significant environmental impacts or issues which were not addressed by the agency.

The Sixth Circuit Court of Appeals has recognized exceptions to the general rule limiting a court's review to the administrative record. In Norwich Eaton Pharmaceutical, Inc. v. Bowen, 808 F.2d 486, 489 (6th Cir. 1987), the court quoted with approval the rule adopted by the Ninth Circuit in Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980):

> It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not.

In United States v. Azko Coatings of America, Inc., 949 F.2d 1409, 1428 (6th Cir. 1991), the Sixth Circuit also noted:

> Other courts have similarly held that a reviewing court evaluating agency action on the administrative record may consider additional evidence as either background information to aid the court's understanding, or to determine if the agency examined all relevant factors or adequately explained its decision.

Nevertheless, the court further stated that a "reviewing court 'must be careful not to allow such evidence to change the character of the hearing from one of review to a trial do novo."' Id.; quoting Town of Burlington v. Dep't. of Educ., 736 F.2d 773, 791 (1st Cir. 1984).

In determining whether or not a party relying on one of the recognized exceptions to the general rule limiting review to the administrative record should be permitted to offer additional evidence outside the record, a court should consider whether that party had an opportunity to offer the evidence during the administrative proceedings. In Davidson v. United States Department of Energy, 838 F.2d 850 (6th Cir. 1988), the Sixth Circuit upheld the district court's refusal to consider plaintiffs' evidence which characterized the agency's validation study as incomplete, unprofessional and not in accordance with EEOC guidelines. In doing so the court noted, Id. at 855-856.:

The administrative record in this case reflects the rulemaking process conducted by DOE with a full opportunity for comment and response. The letters written by DOE to plaintiffs' union representatives, including plaintiff Davidson, gave the plaintiffs fair notice of DOE's proposed actions, and the public hearing conducted as part of the rulemaking process afforded plaintiffs ample opportunity to raise criticisms regarding the soundness and propriety of the validation study. Plaintiffs did not choose to voice their current concerns during the rulemaking process. If they had, their criticisms would have been incorporated in the administrative record for future judicial review. Having failed to do so, and thus having failed to afford the Secretary an opportunity to respond to those criticisms during the rulemaking process, plaintiffs will not be permitted to introduce new evidence in this judicial proceeding of their concerns, expressed nearly three years after the completion of the administrative process.

Similar considerations were a factor in the Sixth Circuit's approval of another district court's rejection of evidence outside the administrative record in Upjohn Manufacturing Co. v. Schweiker, 681 F.2d 480, 483 (6th Cir. 1982):

> It is to be emphasized that Upjohn did not file with FDA the affidavits which it now contends should have been considered by the district court. Upjohn could have filed a petition for reconsideration of FDA's approval of the Boots application. 21 C.F.R. § 10.33. By that procedure the affidavits could have been submitted to FDA and made a part of the administrative record for judicial review. Instead, Upjohn chose to present the affidavits for the first time in the district court.

Other circuit courts of appeals have upheld the rejection of evidence offered to supplement an administrative record where the party offering such evidence had the opportunity to raise the issue before the agency. In Havasupai Tribe v. Robertson, 943 F.2 32 (9th Cir. 1991) the Ninth Circuit affirmed the district court's refusal to consider evidence outside the record under circumstances quite similar to those present in the instant case. In Havasupai Tribe, the tribe challenged a decision of the Forest Service approving the development of a uranium mine in the area of the Grand Canyon, alleging that the Forest Service did not adequately consider the effects of such a mine on their water supply as required by NEPA. The district court limited its review to the administrative record and refused to admit additional evidence tendered by the tribe. The Ninth Circuit affirmed, stating Id. at 34:

> The Tribe's most troubling claim is that there was inadequate consideration by the government of the effects of the mining on groundwater which supplies the Tribe's water. In support of this claim, however, the Tribe relies upon the contentions of Dr. David Kramer, which were made in a letter drafted after the final EIS issued. The Tribe had some obligation to raise these issues during the comment process. Its views were solicited. Absent exceptional circumstances, such belatedly raised issues may not form a basis for reversal of an agency decision. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54, 98 S. Ct. 1197, 1216-17, 55 L.Ed.2d 460 (1978).

Thus, in considering whether the Plaintiffs should be permitted to offer the evidence they now tender, the Court

must consider not only whether the evidence fits one of the recognized exceptions to the general rule that the Court's review is limited to the administrative record, but also whether Plaintiffs were afforded an adequate opportunity to present this evidence to the agency during its deliberative process, and if so, whether there are any exceptional circumstances which excuse their failure to do so.

The management of the national forests is entrusted to the United States Department of Agriculture Forest Service. The NFMA requires the Forest Service to develop long-term plans for the management of national forests. The legislative history of the Act indicates that one of its goals was "to get the practice of forestry out of the Courts and back into the forests." 122 Cong. Rec. at 33835 (1976). Under NFMA and its regulations, the development of a forest management plan proceeds through a series of steps which ensure public involvement at each stage of the planning process. See 36 C.F.R. § 219.6, § 219.10, § 219.12. The first step is to canvass the public and the agency staff to identify the issues that the plan should address. Once that assessment is completed, several alternative management plans are constructed and each is subjected to an analysis of costs, benefits and environmental impacts, in accordance with NEPA. After reviewing the environmental impacts and the cost benefit analysis, the Regional Forester for the administrative region in which the forest is located selects the alternative that in his opinion will "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long-term net public benefits in an environmentally sound manner." 36 C.F.R. § 219.1(a), § 219.10(c). The approved plan controls all activity within the forest for a ten to fifteen-year period.

The planning process for the WNF began in 1981 and continued over a period of five years. In August, 1986, the Forest Service published the proposed plan together with a draft environmental impact statement ("DEIS") and distributed them to the public for comment for a ninety-day period. On January 4, 1988, after analyzing over 1,500 written comments, the Forest Service adopted the final plan accompanied by a record of decision ("ROD") and a final environmental impact statement. ("FEIS")

Both Plaintiffs participated extensively in the initial planning process and in the comment period following publication of the proposed plan and the DEIS. Representatives of the Sierra Club attended public meetings to identify and discuss relevant issues in November 1981, October 1985, February 1986, and October 1986. DEIS Appendix A, pp. A-1, A-29, A-30. Members of the Plaintiff groups and the groups themselves sent letters commenting on the DEIS during the comment period. FEIS Appendix A, pp. A-4, A-6, A-9, A-11. Members of the Sierra Club participated in a workshop in February, 1987 which was held for the purpose of resolving major issues raised during the comment process. FEIS Appendix C, pp. C-1, C-2. Both Plaintiffs appealed the decision to adopt the final plan. Both were represented by counsel and both filed lengthy statements of reasons with attachments. Between May, 1988 and March, 1989, officials of the Forest Service met with representatives of each Plaintiff to attempt to resolve their differences. After the Regional Forester issued responsive statements to the Plaintiffs' filings, the Plaintiffs filed replies. In addition, the Sierra Club presented its views in an oral argument on October 20, 1989. Citizens Council declined to participate in the oral hearing. The Chief of the Forest Service issued decisions on November 14, 1990 and January 14, 1992,

denying Plaintiffs' appeals. Plaintiffs' filed this action on March 18, 1992.

Plaintiffs seek to introduce the testimony of seven expert witnesses. They have tendered affidavits and reports which contain the opinions and probable testimony of each of these potential witnesses. The Court will give individual consideration to whether each of them should be permitted to testify in this proceeding.

Ronald O'Toole

Mr. O'Toole is a forester and a forest economist who is familiar with a computer program known as FORPLAN, which is used by forest planners to develop forest plans. He was retained by the Sierra Club to prepare a detailed review of the WNF plan. In order to do this, he visited the Forest Supervisor's Office and examined computer runs and other background planning documents. O'Toole asserts that the DEIS incorrectly states that the Wayne FORPLAN model made all forest land available for non-timber prescription when in fact -- except for areas specifically placed in a non-timber category -- FORPLAN was only allowed to choose among different timber prescriptions. O'Toole's assertion is based on his interpretation of a table which is part of DEIS Appendix B. The FORPLAN computer modeling program is described in great detail in the DEIS, Appendix B, Part Three. Citing specific portions of the DEIS, Defendants show that the planners did make all acres of the forest available for non-timber management in their initial evaluation of the range of planning options and potential outputs. See DEIS Appendix B, p. B6-20. O'Toole's own report acknowledges that in two "benchmark" runs of FORPLAN, all areas of the forest were available for non-timber prescription. See O'Toole Report,

pp. 8, 18. Plaintiffs assert that O'Toole will show that an assumption not revealed in the planning documents was that recreation can only take place in areas where timbering is allowed. O'Toole's report, however, states that the model "explicitly assumed that the highest levels [recreation] could only take place in the presence of timber cutting." O'Toole Report, p.i.i.i. If the assumption is explicit, there is no need for O'Toole's testimony to demonstrate it.

The FORPLAN computer runs are part of the planning documents and are part of the administrative record. See Declaration of Robert K. Ballentyne and attached Planning Record Index. (Doc. 14) The Court concludes that the administrative record contains sufficient information to determine how the Forest Service used the FORPLAN computer program and whether there were any misrepresentations or unstated assumptions as alleged by plaintiffs.

O'Toole's basic objection to the plan seems to be based on cost efficiency, particularly the fact that the plan includes below-cost timber sales, which he believes is contrary to the NFMA. Plaintiffs made these arguments during the administrative proceedings and they may now argue to this Court that the Forest Service acted in an arbitrary and capricious manner in rejecting them and adopting the final plan. The Court finds no justification for admitting additional evidence outside the administrative record in order to address these arguments, nor have Plaintiffs advanced any reason why Mr. O'Toole's testimony and arguments could not have been presented during the administrative process.

James M. Northrup

Mr. Northrup is a principal in a private consulting firm which does environmental planning and analysis. He previously served as forest planner and NEPA Coordinator on the Green Mountain National Forest in Vermont. Northrup states that the WNFP planning documents are lengthy and contain much technical, complex information, which is communicated using legal, economic, silvicultural and other technical terms not commonly understood by the average citizen. He asserts that the criteria used by the Regional Forester to select the plan are not clearly stated in the ROD and that it focuses on differences among the alternatives considered instead of the rationale for selecting one over the others. He claims that the analysis of public demands for resources and uses is inadequately documented, appears fundamentally flawed, and may have been misapplied, and that the alternatives analyzed did not cover the reasonable range required by NEPA. He contends that an abbreviated FEIS is insufficient and that additional alternatives should have been considered in formulating the environmental impact statement. His fourteen-page affidavit contains these and other legal arguments and conclusory statements attacking the plan and the planning process and in many instances comparing it unfavorably with the plan adopted for the Green Mountain National Forest.

While it is true that the WNFP planning documents are lengthy and technical, courts are often called upon to analyze lengthy, technical material. The Court has found these documents to be intelligible and their concepts and terminology capable of being understood without expert assistance. It is not appropriate to admit evidence outside the record for the purpose of comparing the WNFP with the Green Mountain

National Forest Plan. The WNFP must stand or fall on its own merits, based upon the administrative record. Some of the points raised by Northrup were raised by the Plaintiffs during the administrative process and the record is adequate to evaluate those claims. To the extent that Northrup raises new objections to the plan, Plaintiffs have failed to show why they did not raise them earlier. To the extent that Northrup asserts legal objections to the plan, these can be asserted by counsel in their briefs on the basis of the facts contained in the administrative record.

For all of these reasons, the Court concludes that Mr. Northrup's testimony should not be admitted.

David R. Dewalle

Mr. Dewalle is a professor of forest hydrology. He is involved in teaching and research related to the water resource impacts of timber harvesting and other land uses. Plaintiffs have submitted an affidavit from Dr. Dewalle stating his opinion that the plan lacks detail to indicate that water resource issues have been adequately addressed or evaluated. His main point appears to be that the plan, "seems to miss the opportunity to improve water resource conditions in the region." Dewalle criticizes the plan's alleged failure to address the problems of erosion resulting from timbering and water pollution caused by previous exploitive activities such as strip mining and oil drilling. He further contends that the plan fails to address how sewage discharge will be handled in connection with future recreational sites that may be constructed or the effect of private development that may occur nearby.

The DEIS shows that consideration was given to existing water resources and the impact the plan would have on them.

The index to the DEIS contains nine references to water and water quality. Comments received in response to the DEIS included concerns that the DEIS considered water quantity rather than quality, that the DEIS failed to offer information on the cumulative impacts on water quality and that it should discuss measures to protect water quality, including water quality monitoring. The Forest Service responded to each of these comments. The plan itself contains numerous references to water and water quality. See Plan Index, Water, Water Holes, Wells and Cisterns. A reference to sewerage treatment facilities states that they will be adequately designed and maintained to protect water quality. See Plan, p. 4-143.

The plan specifically addresses water pollution resulting from abandoned underground coal mines and states, "At this time, an efficient and reliable method does not exist to reclaim these sites so that they do not contribute to the pollution of the streams and lakes." Plan, p. 3-15. Defendants point out (the Court believes correctly) that issues relative to sewerage treatment and handling facilities must await the planning of specific projects at specific locations. Finally, the administrative record discloses that the Forest Service considered the effects of erosion resulting from timbering activities.

It appears that the issues raised by Dewalle were addressed in the planning process and that the administrative record contains sufficient information for the Court to evaluate Plaintiffs' claims that the plan and the environmental impact statement do not sufficientiy address water quality concerns. Furthermore, the Court can discern no reason why Plaintiffs could not have presented Dewalle's criticisms to the agency during the administrative process.

A. Claude Ferguson

Mr. Ferguson has a Bachelor of Science degree in Forestry. He held various positions of employment with the Forest Service until 1976. He was the forest supervisor for the WNF in 1966. Plaintiffs have submitted a fifteen-page report authored by Mr. Ferguson, in which he outlines his objections to clearcutting as the dominant timber-harvesting method used in the plan. Ferguson expresses his opinions on the adverse consequences of clearcutting and attacks the grounds relied upon by the Forest Service in selecting it. He expresses other objections to the planning process. Much of Mr. Ferguson's criticism is based on the results of a Purdue University study of timber regeneration in the Wayne-Hoosier National Forest in Indiana, which was published in December of 1987, three months after the WNF plan was adopted. This study was not available to the Forest Service during the planning process. The Court must judge an agency's actions by the information available to it at the time it makes it's decision. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). The Purdue study was, however, available to the Plaintiffs during the administrative appeal process and they offer no excuse for their failure to include it in their submission during the appeal process.

The plan, the DEIS and the FEIS show that considerable attention was given to the issue of clearcutting or "even-aged management." See Plan, Chapter 3, Vegetative Management.

Ferguson contends that the plan deceptively labels patch clearcutting as group cutting and categorizes it as uneven-aged management, contrary to accepted silvicultural practice. However, the DEIS at p. 4-24 et seq. defines how group

cutting is used in the plan and acknowledges that it can resemble clearcutting.

During the comment period, several commentors expressed objections to clearcutting, citing many of the reasons relied on by Mr. Ferguson in his report. See FEIS, Chapter 2, p. 215 et seq. The record is adequate to evaluate Plaintiffs' objection to clearcutting. In a general sense, Ferguson's objections were considered by the Forest Service during the administrative process, and to the extent that any of his objections were not specifically raised or addressed, it is only because Plaintiffs failed to raise them when they had the opportunity to do so.

Stephen M. McKee, James R. Runkle, William Buskirk

Mr. McKee describes himself as a botanist, ecologist and field naturalist. He received a Master of Science degree in botany from Miami University at Oxford, Ohio. He believes that the Forest Service was mistaken in its assessment of the effects of clearcutting on bio-diversity. According to Mr. McKee, the issue of bio-diversity should have been examined on a regional basis and the Forest Service should have been more concerned about preserving mature forest species. McKee also disagrees with some of the plan's assumptions regarding the nature of regrowth in harvested areas and the amount of' time necessary for regeneration after clearcutting, and notes the plan's failure to address contrary scientific views on the effects of clearcutting.

Runkle is an associate professor of biological sciences at Wright State University in Dayton, Ohio. He questions the plan's conclusion that 120-year rotations are sufficient to favor wildlife species that require mature and over-mature hardwoods. He believes that in reaching this conclusion, the

Forest Service focused on vertebrates and overlooked other species, including fungi, herbs, insects, and other invertebrates. He says the plan contains no data guaranteeing that the needs of such other species will be met. He believes the plan ignores landscape ecology, specifically, "how the spatial arrangement of different habitats in a large region ("landscape") affects the distribution and abundance of organisms living in that landscape." Finally, he questions the use of clearcutting as the preferred method for regenerating oak and hickory forests on the ground that this is scientifically uncertain. He believes that clearcutting should be postponed until new silvicultural techniques have been developed.

Buskirk is a biologist who is an expert in avian ecology. He believes that the plan overlooks certain environmental impacts because "the planners were unaware of or ignored recent evidence and perspectives in the scientific literature related to the conservation of biological diversity." He challenges the plan's assumption that full diversity of habitat types is needed to perpetuate biological diversity. He says that this assumption fails to recognize that some species are much less mobile than others and less likely to re-colonize areas of extinction after habitats have returned to predisturbance conditions. He says his opinions are based on developing scientific literature and he cites scientific publications as recent as 1992. Again, the decision of the Forest Service to adopt the plan must be judged on the information available to it at the time. Vermont Yankee, 435 U.S. at 553. He believes that some of the terminology used in the plan is "harvest-biased." He asserts that the plan overlooks the impacts of producing forest edges along clear cuts and the effects of invasion of native habitats by introduced "exotic" vegetation.

Most of the issues raised by McKee, Runkle and Buskirk are addressed, at least generally, in the administrative record. Plan Appendix B is devoted entirely to the issue of the plan's impact on plant and animal species. The plan further indicates that in choosing harvest methods and rotation ages, the Forest Service considered wildlife habitat diversity needs. See Plan Appendix C, p. C-5 et seq.; FEIS Appendix E, p. E-1 et seq.; DEIS pp. 4-21, 4-22, 4-40 et seq. These issues were also addressed during the administrative appeals. The Court concludes that the administrative record sufficiently addresses the general areas of concern raised by McKee, Runkle and Buskirk, and to the extent that specific concerns or objections were not raised or addressed, Plaintiffs have shown no excuse for their failure to raise them when they had the opportunity to do so during the administrative process.

Conclusion

The planning process for the WNFP began well over ten years ago. The full planning record contains tens of thousands of pages of documents. Plaintiffs were extensively involved in the planning process, the public comment process and the administrative appeal process. Now, plaintiffs want the Court to consider the testimony of seven expert witnesses, none of whom provided testimony, reports or affidavits to the Forest Service at any stage of the proceeding, and each of whom has lengthy, multi-faceted and highly technical criticisms of the plan. An examination of the affidavits and reports of these experts reveals that the breadth and scope of their criticisms and the evidence which the defendants would likely introduce to rebut them would, if the Court permitted them to testify, transform this case into a de novo hearing on the merits of the plan. This would effectively reopen the planning process and put the Court in the role of the Forest Planner, a role which it

has neither the resources nor the expertise to perform. See Cronin v. United States Department of Agriculture, 919 F.2d 439, 444 (7th Cir. 1990).

These plaintiffs are not unsophisticated litigants. They have significant resources and considerable expertise in environmental litigation. They have certainly known all along where to go to obtain the kind of evidence they now seek to offer for the first time in this Court. While it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon those who have objections to structure their participation in the administrative process so that it is meaningful, so that it alerts the agency to their position and contentions. Vermont Yankee, 435 U.S. at 553. To wait years to offer voluminous objections by an army of experts borders on the kind of gamesmanship condemned by the Supreme Court. Id.

Defendants' motion in limine to limit review to the administrative record is well taken and is **GRANTED**.

IT IS SO ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM, JUDGE
United States District

APPENDIX D

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

Reply To: 1570-1(LMP)

Date: November 14, 1990

CERTIFIED RECEIPT REQUESTED

Jerome C. Tinianow
Hahn Loeser & Parks
800 National City E. 6th Building
1965 East 6th Street
Cleveland, Ohio 44114-2262

RE: Appeal of the Wayne National Forest Land and Resource Management Plan (#2309)

Dear Mr. Tinianow:

Pursuant to 36 CFR 211.18, this letter is our final decision on your appeal of the Wayne National Forest Land and Resource Management Plan (Forest Plan/Plan) and its accompanying Final Environmental Impact Statement (FEIS).

You are representing the Sierra Club, Ohio Chapter who are the appellants. Intervenors are: the American Motorcyclist Association; the Little Muskingum Watershed Association; the Appalachian Mother Earth Network; Dale W. Riddle Forest Products, Inc.; Waldron Lumber Company, Inc.; The Ohio Forestry Association, Inc.; the National Wild Turkey Federation, Inc., Ohio State Chapter; the Ruffed Grouse Society; the Southeaster Ohio Oil and Gas Association; the

Ohio Chapter of the Wildlife Society; the Mead Corporation; and Gary L. and Laurel L. Hamilton.

The allegations in your appeal are: 1) "The Plan permits unjustified timber sales below cost, thereby allowing timber harvesting on lands which are not suitable for this activity"; 2) "The Plan perverts statutory and regulatory requirements pertaining to biological diversity by using them to justify creation of conditions that are common outside of the Forest, in favor of conditions which are available mainly or even exclusively in the Forest"; 3) "The Forest Plan allows clearcutting on 80% of the suitable timber land without demonstrating that it is the optimal method of timber harvest"; and 4) "The adjustments to the Plan needed to correct the errors identified above will require additional adjustments in other areas of the Plan."

You appealed the plan "based on a number of errors" with a request that "the Plan be remanded to the Regional Forester with instructions to redraft it to eliminate these errors." "[T]he result is a Plan which provides for too much timber harvesting, in too large an area, by the wrong methods, at too low a price" (SOR, page 2).

ISSUE 1 - WHETHER THE FOREST PLAN ALLOWS UNJUSTIFIED BELOW COST TIMBER SALES.

In the SOR (page 6), the appellants contend that the inclusion of below-cost timber sales is a violation of section 6(k) of NFMA and/or the MacCleery decision and therefore ". . . will allow timber harvest on unsuitable land in violation of the law. You further state "[T]he Regional Forester's reliance on intangible benefits to establish the economic viability of including certain lands in the timber base is particularly objectionable" (SOR page 8).

Discussion:

Below-cost timber sales has become an item of considerable debate. However, most arguments tend to ignore the fact that the Forest Service is required by law to manage the Forest for multiple uses. In managing timber, as one of the multiple uses, we must insure that we are cost effective in our management practices but this does not necessarily equate with making a profit. In Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), the Ninth Circuit Court rejected the argument that timber can only be harvested where the value of the timber exceeds the cost of the harvest.

The requirements for identification of lands which are not suitable for timber production are contained in the implementing regulations of 36 CFR 219.14(a) through (d). The suitability process consists of three stages as described by these regulations. The result of this analysis by the Wayne National Forest is displayed by alternative in the Draft Environmental Impact Statement (DEIS), Appendix B, part 3 (table B3-9 and pages B3-39) and the FEIS page 1-11. The intent of the first stage of this procedure is to ensure that timber production will not be attempted where it might cause irreversible resource damage or deforestation. The intent of the second and third stages of this procedure in to ensure that land is selected for timber production in such way that the multiple-use goals and objectives of the LRMP are achieved in the most cost-efficient manner possible.

The results of the analysis show that the amount of land classified as suitable timber land ranges from 17,878 acres in Alternative 7 to 147,742 acres in Alternative 6. Modified Alternative 3 (the Forest plan) has 126,107 acres identified as suitable for timber production. The process used by the Forest

to determine lands suitable for timber production is consistent with 36 CFR 219.14 and NFMA.

The appeal record shows that cost efficiency was considered throughout the planning process (FEIS appendix B). This analysis is done by alternative for the entire Forest, not for each individual timber sale that will follow. The regulation at CFR 219.3 defines "cost efficiency" as "[T]he usefulness of specified inputs (costs) to produce specified outputs (benefits). In measuring cost efficiency, some outputs, including environmental, economic, or social impacts, are not assigned monetary values but are achieved at specified levels in the least cost manner." Therefore, "cost efficiency" takes into account both priced and non-priced (or intangible) values.

The present net value (PNV) is a primary economic criterion used by the Regional Forester to compare economic efficiency of alternatives. However, PNV does not measure the nonpriced benefits of Forest management.

The Regional Forester is not required to select an alternative with the highest PNV. The NFMA regulation (36 CRF 219.1) prescribes that the Forest Plan shall prescribe management which will maximize long-term public benefits in an environmentally sound manner.

Although the appellants find ". . . the Regional Forester's reliance on intangible benefits to establish the economic viability of including certain lands in the timber base objectionable," the determination of which alternative has the highest net public benefit derived from the array of alternatives included in the analysis. The Regional Forester recognizes that below-cost sales may occur under the provisions of the Forest Plan (DEIS, Page 2-85 through 87; FEIS, pages 2-18 through 19; ROD, Pages 20-21) and discusses efforts to cut

costs and raise revenues in order to reduce the incidence of below-cost sales.

During implementation of the Forest Plan, the costs and benefits of different ways to carry out timber sales are evaluated on a sale-by-sale basis. For each proposed sale, a no action alternative, which has no timber harvesting, is also considered. Specific information related to current timber prices as well as the costs of timber harvesting are available to support judgements about the practicality of specific timber sale proposals and to support final decisions of whether or not to proceed with specific timber sales. You have opportunities to be involved in these decisions and to appeal them if you disagree.

Appellants cite the decision letter of July 31, 1985, by the Deputy Assistant Secretary of Agriculture on the appeals of the Grand Mesa, Uncompahgre, and Gunnison (GMUG) National Forests and the San Juan National Forest (Secretary's decision), contending that the "Decision" (ROD) is inadequate because it does not provide in appropriate detail the Justification for a proposed timber program where costs are projected to exceed receipts.

In general, our policy is that the ROD for the Forest Plan must explain why the alternative selected to become the Forest Plan will come closer to maximizing net public benefits than other alternatives considered in the FEIS. The alternative that maximizes net public benefits may provide for a timber sale program in which projected timber sale revenues are less than the projected costs of carrying out the sales. In such cases, the ROD must explain why the projected nonrevenue benefits are believed to balance the projected costs.

In his determination that Alternative 3 maximizes net public benefits, the Regional Forester (ROD, page 4) states that "[I]n making the decision, a determination of net public benefits cannot be reduced to any kind of single index for comparison of the Alternatives. Benefits, costs, and other environmental effects were considered in combination. Public preferences expressed as issues and concerns and in comments on the DEIS received particular consideration in the decision making process." The Regional Forester's rationale for selecting Alternative 3 as the one that, in his judgement, best meets the net public benefits is contained in the ROD (pages 7-24). The Regional Forester goes on to state "[w]hile some management practices in the Forest Plan do not have the lowest cost, these practices do contribute to a greater overall net public benefit. These benefits include providing a broad range of dispersed recreation opportunities, enhancing scenery, and improving the quality of wildlife habitat" (ROD, page 29).

Conclusion

In reviewing the record with respect to below-cost sales, we conclude that the timber sale program has multiple objectives, will not attempt to offer timber volumes in excess of actual timber demand, and recognizes the need to reduce program costs while still providing an appropriate level of nontimber multiple-use objectives. Although timber costs are projected to exceed timber revenues for the planning horizon (DEIS, table 2-33, page 2-83), the Forest Plan proposes a decrease in the timber program from 8.1 million board feet per year (MMBF/Yr), the average volume sold for the last ten years (1978-1987), to 7.5 MMBF/Yr. Even though the Regional Forester chose an alternative that allowed for below-cost timber sales, the record (ROD) shows he fully considered this issue.

We find that the Forest's cost efficiency analysis was not a departure from required procedures and was not arbitrary or capricious. The Regional Forester properly developed the decision in the ROD and the analysis conducted in the FEIS is consistent with the requirements of the Secretary's decision. The Regional Forester is affirmed.

Issue 2 - WHETHER THE FOREST PLAN COMPLIES WITH STATUTORY AND REGULATORY REQUIREMENTS PERTAINING TO DIVERSITY

You contend that it is not appropriate to justify clearcutting in a large part based on the need to preserve biological diversity. "[R]ather, forested land in the Wayne is far more "suitable" to the provision of habitat which is rare in the surrounding area, namely, old growth." The appellants maintain that clearcutting will only add additional early successional habitat that is commonly found on private lands surrounding the forest (SOR, page 10).

In response to this contention, the Regional Forester points out that changes were made between the DEIS and Final Plan to give more emphasis to large continuous forest tracts of old-growth forest and provide more large, unbroken areas of mature and overmature hardwoods (RS, page 14). It is recognized in the FEIS ". . . that the Wayne offers an opportunity to develops some relatively large areas of continuous, public old-growth forest in Ohio which will provide unique recreation opportunity, add to Forest biological diversity, provide important habitat for forest interior wildlife species, and contribute to the local economy" (FEIS, page 2-27).

The planning regulations require coordination of the Forest planning effort with other State and Federal agencies, State and

local governments, and Indian tribes (36 CFR 219.7). The regulations also require coordination to the extent practicable with owners of lands that are intermingled with, or dependent for access upon, National Forest System lands. (36 CFR 219.6). In reviewing the record we find that, based on public comment and comments specifically from agencies such as described above, consideration was given in the planning process to activities on surrounding lands (FEIS, pages 2-22 thru 2-29) (ROD, pages, 24 and 25).

While Forests are required to consider and be cognizant of conditions on adjacent lands under other agency administration and other ownerships, NFMA does not require our planning and proposed management to defer to those conditions. The Forest Service enjoys broad discretion in establishing Forest Plan direction to achieve its statutory mission of multiple-use, sustained yield management of the National Forest System. The Forest Plan establishes the overall goals and objectives for the management of the land and resources of a Forest. It is during forest plan implementation that the conditions on National forest and other public lands as well as private lands are evaluated to assess cumulative effects as part of the NEPA site-specific analysis required for project and activity level decisions.

The Forest Plan must provide for diversity of plant and animal communities consistent with the multiple-use objectives of the planning area, which in this case is the National Forest. The laws and regulations do not specify a particular level or ratio (balance) of multiple uses a National Forest must maintain. Forest planning regulations provide that the interdisciplinary team shall consider how the plant and animal communities and species will be affected by various mixes of resource outputs and uses (36 CFR 219.3 and 219.26). The regulations

establish no additional requirements for diversity beyond those identified for management indicator species, population viability of sensitive specifies, recovery of threatened or endangered species of plants and animals, and protection of special habitats.

The Record of Decision (Page 17) states that "[t]he criteria for choosing a particular silvicultural system and harvest method are based upon the desired future land condition, wildlife populations, vegetative diversity, visual quality objectives, economics, timber products demand and recreational use." Even-aged timber management (clearcutting) obviously changes the forest environment and favors some plant and animal species over others. However, the appellants have not shown that the amount, timing, location, and standards for even-aged timber harvesting is the Wayne Forest Plan will have adverse effects on the abundance and distribution of plant and animal species. The Forest responded to public comment about old growth in the DEIS by increasing in the Forest Plan the amount of old growth for wildlife habitat, ecosystem diversity, and preservation for recreation and aesthetic reasons.

Conclusion

We find that the Wayne Forest Plan provides for diversity in accordance with the requirements of the NFMA and the planning regulations. The Regional Forester is affirmed.

ISSUE 3 - WHETHER THE FOREST PLAN HAS DEMONSTRATED THAT CLEARCUTTING IS THE OPTIMUM METHOD.

Appellants contend that the Forest Plan fails to support even-aged management (clearcutting) as the optimum method in violation of applicable laws and regulations.

Before addressing this specific issue, it is important to understand the decisions that are made in the Forest Plan and those decisions that are made during implementation of the Plan.

It is important to understand that the Forest Plan represents only one level in decisionmaking about the management of the Wayne National Forest and that final decisions are yet to be made on many matters of evident concern to the appellants.

The Forest Plan establishes a broad programmatic management system for the Wayne National Forest. It sets goals for National Forest management and a set of standard and guidelines to follow in pursuit of those goals. It identifies land that is suitable for timber harvest on a Forest-wide basis. It establishes a monitoring process to help determine how well the standards and guidelines are working and whether the goals remain appropriate during the period when the Forest Plan is implemented.

The Forest Plan identifies, through the management prescriptions, the desired future condition of the Forest and sets the stage for project or activity review, but does not provide the last word. Forest Plans are not a collection of individual project decisions which create irretrievable commitments of resources. Such Plans would inhibit use of new information, response to changes in demands and needs, adoption of new technology, and response to evidence from monitoring. It is during Forest Plan implementation that we determine management practices to meet overall goals and objectives consistent with the Plans standard and guidelines. Decisions at the project planning level and the Forest Plan monitoring and evaluation processes provide for regular reviews to ensure validity of planning assumptions.

In the case of the Wayne National Forest Land and Resource Management Plan, Appendix C includes a thorough discussion of harvest methods that are considered for use and demonstrates that even-aged management, primarily clearcutting, is the method usually most suited to meeting alternative objectives in the forest types common to the Wayne National Forest. However, the Regional Forester in his Responsive Statement (page 16) states that "(t)he Forest Plan has established a programmatic system for future management decision making. The silvicultural systems chosen in the Forest Plan do not constitute a decision to take action on the ground. Those decisions are made for individual site-specific [projects] when implementing a Forest Plan."

Conclusion.

The Regional Forester is affirmed. The optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest to achieve specific management objectives. However the analysis and final decision on the appropriateness of even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

DECISION

The Regional Forester is affirmed. Based on our review of the record, we conclude that the Regional Forester has looked at all sides of the issues relating to timber harvest and vegetation management. We find no basis for changing his decision. Further, we have concluded that there are adequate requirements for further analysis provided during

implementation of the Wayne National Forest Land and Resource Management Plan to ensure proper harvest methods are evaluated in meeting management objectives for wildlife and other resources. The requirements include site-specific environmental analysis, with consideration of cumulative effects and a no action alternative; proper public notification of the intended action; and another point of appeal afforded the public (see 36 CFR 217) as a decision to act is made.

Thank you for your interest, and we hope that you will continue to participate in the management of the Wayne National Forest. While the Regional Forester used the best information available at the time in developing the Forest Plan, there is a continuing need to evaluate original assumptions as new information becomes available. The forest planning, monitoring, and evaluation process provides for regular reviews to ensure validity of planning assumptions. We are committed to making appropriate changes in the Forest Plan whenever necessary. The planning process is designed to be responsive to changing information, conditions, or demand (36 CFR 219.10 (f) and (g)). This is an ongoing commitment, and we will need assistance and advice from you and others to reach this goal.

This is the final administrative decision by the Department of Agriculture, unless the Secretary, on his own initiative, elects to review the decision within 10 days of receipt (36 CFR 211.18(f)).

Sincerely,

/s/David G. Unger
DAVID G. UNGER
Reviewing Officer for the Chief

APPENDIX E

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW
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Reply To: 1570-1 (LMP)

Date: 14 Jan 1992

CERTIFIED RECEIPT REQUESTED

Mr. Everett Hewlett
Citizens' Council on Conservation
and Environmental Control
P.O. Box 10841
New Marshfield, Ohio 45766

RE: Appeal of the Wayne National Forest Land and Resource Management Plan (#2313)

Dear Mr. Hewlett:

This is our decision on the appeal of the Wayne National Forest Land and Resource Management Plan (Forest Plan or LRMP) which was filed on behalf of the Citizens' Council on Conservation and Environmental Control. We conducted our review pursuant to the provisions of the appeal regulations at 36 CFR 211. This is the final decision of the Department of Agriculture on your appeal unless the Secretary, acting on his own initiative, elects to review it within 10 days of receipt.

There are 10 intervenors: The American Motorcyclist Association, the Little Muskingum Watershed Association, the Appalachian Mother Earth Network, the Ohio Forestry

Association, Dale W. Riddle Forest Products, Inc., Waldron Lumber Co., Inc., Mead Corporation, Ruffed Grouse Society, Southeastern Oil and Gas Association, and the Ohio Chapter of the Wildlife Society. Comments were received for the record from Ohio University Ecology Club and other individuals.

On January 4, 1988, Regional Forester for the Eastern Region Floyd J. Marita signed the Record of Decision (ROD) approving the Forest Plan for the Wayne National Forest. On January 4, 1988, you appealed that decision. No stay was granted in conjunction with your appeal. Your appeal was filed under appeal regulations 36 CFR 211.18.

Summary of Decision

Based on our review of the record, and for the reasons discussed in the enclosed decision on appeal #2313, it is our decision to affirm the Regional Forester's decision to approve the Forest Plan. Although we deny the relief requested (that the Land and Resource Management Plan and Final Environmental Impact Statement be re-submitted in a draft) appellants will have the opportunity to participate in project level decisions, monitoring, evaluation, amendment, and revision of the Forest Plan.

While the Regional Forester used the best information available at the time in developing the Forest Plan, there is a continuing need to evaluate original assumptions as new information becomes available. The Forest planning, monitoring, and evaluation process provides for regular reviews to ensure validity of planning assumptions. We are committed to making appropriate changes in the Forest Plan whenever necessary. The planning process is designed to be responsive to changing information, conditions, or demands

(36 CFR 219.10(f) and (g). This is an ongoing commitment, and we will need assistance and advice from you and others to reach this goal.

Throughout this decision we have explained that many of your concerns have to do with project level decisionmaking. That a Forest Plan allows decisions to be made to implement projects does not mean that all possible projects consistent with the Forest Plan will go forward. In affirming the Regional Forester's approval of the Forest Plan we do not make any judgment on individual project decisions. We expect appellants to make their concerns known as projects are proposed and decided upon.

During Forest Plan implementation, in accordance with applicable regulations and Agency directives, the Regional Forester will ensure that appropriate site-specific analysis will occur at a time when a project proposal is sufficiently defined to enable full consideration of the environmental consequences. Appellants will have an opportunity to participate in project decisions, including the right of administrative appeal.

Sincerely,

/s/David G. Unger
DAVID G. UNGER
Reviewing Officer for the Chief

Enclosure

APPEAL DECISION

WAYNE NATIONAL FOREST
LAND AND RESOURCE MANAGEMENT PLAN

APPEAL #2313

DAVID G. UNGER
Reviewing Officer for the Chief

/s/ David G. Unger

Date: 1/10/92

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Decision
Wayne National Forest
Land and Resource Management Plan
Appeal # 2313

Summary of Decision

Based on our review of the record, and for the reasons discussed below, we affirm the Regional Forester's decision to approve the Wayne Forest Plan. Although we deny the relief requested (that the Land and Resource Management Plan and Final Environmental Impact Statement be re-submitted in a draft) appellants will have the opportunity to participate in project level decisions, monitoring, evaluation, amendment, and revision of the Forest Plan.

While the Regional Forester used the best information available at the time in developing the Forest Plan, there is a continuing need to evaluate original assumptions as new information becomes available. The Forest planning, monitoring, and evaluation process provides for regular reviews to ensure validity of planning assumptions. We are committed to making appropriate changes in the Forest Plan whenever necessary. The planning process is designed to be responsive to changing information, conditions, or demands (36 CFR 219.10(f) and (g)). This is an ongoing commitment, and we will need assistance and advice from you and others to reach this goal.

Throughout this decision we have explained that many of your concerns have to do with project level decisionmaking. That a Forest Plan allows decisions to be made to implement projects does not mean that all possible projects consistent with the Forest Plan will go forward. In affirming the Regional Forester's approval of the Forest Plan we do not make any

judgment on individual project decisions. We expect appellants to make their concerns known as projects are proposed and decided upon.

During Forest Plan implementation, in accordance with applicable regulations and Agency directives, the Regional Forester will ensure that appropriate site-specific analysis will occur at a time when a project proposal is sufficiently defined to enable full consideration of the environmental consequences. Appellants will have an opportunity to participate in project decisions, including the right of administrative appeal.

Procedural History

Regional Forester for the Eastern Region Floyd J. Marita signed the Record of Decision (ROD) approving the Forest Plan for the Wayne National Forest on January 4, 1988. Appellants filed a Notice of Appeal (NOA) and request for oral presentation on January 4, 1988, and filed a Statement of Reasons (SOR) on April 19, 1988. On May 4, 1989, the Regional Forester sent a Responsive Statement (RS) to appellants and they filed a reply to it (RRS) on May 27, 1989. Intervenor Appalachian Mother Earth Network requested a stay of decision on June 12, 1989, which was denied on June 28, 1989. The Appeal Record was sent to the Chief for review on July 28, 1989. Appellants waived the opportunity for an oral presentation. The Record is now closed.

Issues

We have identified the following issues in your SOR.

1. Whether the timber program in the Wayne Forest Plan complies with the National Forest Management Act (NFMA), Forest Service Policy, Department Policy, and the National Environmental Policy Act (NEPA).

2. Whether the Wayne Forest Plan violates NEPA.

3. Whether the Forest Plan is based on an adequate assessment of wildlife diversity.

4. Whether the Forest Plan Adequately Protects Water Quality.

5. Whether the Forest Plan Violates NFMA and 36 CFR 219.21 with respect to Recreation.

6. Whether the Forest Plan's assessment of The Visual Resource violates NFMA and implementing regulations.

7. Whether the Forest Plan respects the cultural resource represented by the Wayne National Forest.

Relief Requested

As relief, the appellants request that the Forest resubmit the Forest Plan "in a draft which provides for the public benefit and legally required protection of Forest resources and environment as outlined in the environmentally preferred alternative, number seven." In addition, you request numerous specific changes in the Plan for each of the areas of concern in your appeal (SOR, pages 97-101).

The intervenors, on the other hand (except for the Appalachian Mother Earth Network), support the ROD and maintain the FEIS is adequate and correct. They maintain that the restrictions imposed and agreements worked out with the Forest in response to comments received on the Draft Environmental Impact Statement will preserve and protect important resources. The intervenors believe that the Plan provides for a balanced management of all resources which will continue to maintain the employment base, and that the tax

income and service industry spin-off will create and maintain a healthy local economy.

The intervenor the Appalachian Mother Earth Network is in full agreement with the appellants' NOA and SOR and, like the appellants, request that the Forest Plan be remanded.

We have characterized your contentions as seven separate issues. The Regional Forester's RS provided a thorough and complete response to many of your specific concerns, and our review focuses on the key elements of each issue to reach a conclusion. Our analysis of these issues follows a discussion of the role of Forest Plans. It is within the context of the role of the Forest Plan in the Forest Service decision process that the appellants's contentions will be addressed.

ROLE OF THE FOREST PLAN

It is important to understand that the Forest Plan represents only one level in decisionmaking about the management of the Wayne National Forest and that final decisions are yet to be made on many matters of evident concern to appellants.

The Forest Plan establishes a broad programmatic management system for the Wayne National Forest. It sets general and specific goals for National Forest management and a set of standards and guidelines to follow in pursuit of those goals. It identifies land that is suitable for timber production and determines the allowable sale quantity (ASQ) and associated sale schedule. It establishes a monitoring process to help determine how well the standards and guidelines are working and whether the goals remain appropriate during the period when the Forest Plan is implemented.

The Forest Plan establishes the desired future condition of the Forest and sets the stage for project or activity review, but

does not provide the last word. Project and activity level decisions are made in the Forest Plan only if they are specifically identified in the Record of Decision and Forest Plan and are sufficiently analyzed to meet National Environmental Policy Act (NEPA) requirements in the FEIS.

The Wayne Forest Plan is not a simple collection of projects to be carried out during the life of the Forest Plan. To implement the Forest Plan, specific projects will be proposed and evaluated before final decisions are made. The evaluation will include whatever additional environmental analysis is needed to comply fully with the National Environmental Policy Act (NEPA) and other environmental laws and regulations. The public will have opportunities to be involved in decisions about these projects and to appeal these decisions.

As a part of the Forest Plan and FEIS development, the Forest Service must address the various Federal environmental laws. The basic approach is to then use Forest Plan management direction as a gateway to compliance with these environmental laws at the project and activity level.

Analysis of Issues

Issue 1. Whether the timber program in the Wayne Forest Plan complies with the National Forest Management Act (NFMA), Forest Service Policy, Department Policy, and the National Environmental Policy Act (NEPA).

Appellants contend "the Forest Service has not demonstrated that their timber program can be cost-effective. The Forest Service has not performed a rigorous analysis of the individual sites to be harvested and as a result, the assumptions which the plan makes over the supposed benefits simply are not

supported by measurable, empirical data and facts" (SOR, page 3). To support this contention, it is argued that:

A. The plan fails to set forth an appropriate explanation of below-cost timber sales. "The broad discretion the Forest Service has exercised in the mismanagement of the Wayne does not extend to ignoring the requirement that each timber sale be cost effective and not below cost" (SOR, page 5). The Forest Service policy of allowing below cost sales is a "violation of existent" law (SOR, page 7).

B. The inclusion of below-cost timber sales is a violation of section 6(k) of the NFMA and/or the MacCleery decision and as a result allows timber harvest on unsuitable land in violation of the law (SOR pages 6-32). Further, the regulations dealing with suitability do not conform with Congress's intent as expressed in 16 USC Section 1604 (k): First, . . . "by allowing other factors, in some cases, to force harvesting on lands where the costs of timbering exceed the revenues to be derived therefrom, these regulations ignore the primary intent of Section 6 (k); i.e., to prevent timbering on economically unsuitable land" (SOR, page 18). Secondly, . . . "the suitability regulations fail because the definition of 'cost efficient' does not reflect the intent of Section 6 (k)" (SOR, page 23). Third, . . . "the suitability regulations are deficient because they do not require site-specific evaluation of economic factors related to timbering" (SOR, page 26).

C. The Forest Plan fails to support even-aged management (clearcutting) as the optimum method of harvest in violation of Section 6(g)(3)(F) of the NFMA and Section 102 of NEPA (SOR, page 36).

D. The Forest Plan violates NFMA by virtue of not being able to sustain the timber harvest level called for in the Plan (SOR, page 47).

A. Below-cost Sales.

Below-cost timber sales have become an item of considerable debate. However, most arguments tend to ignore the fact that the Forest Service is required by law to manage the Forest for multiple uses. In managing timber as one of the multiple uses we must insure that we are cost effective in our management practices. Cost effectiveness, however, does not necessarily equate with making a profit. In Thomas v. Peterson, 735 F.2d 754 (9th Cir. 1985), the Ninth Circuit Court rejected the argument that timber may only be harvested where the value of the timber exceeds the cost of the harvest.

The appeal record shows that cost efficiency was considered throughout the planning process (FEIS appendix B). The cost efficiency analysis is done by alternative for the entire Forest, not for each individual timber sale that will follow. Although the appellants assert that cost efficiency analysis should have been done for "actual harvest sites," such specificity is appropriately left to subsequent project planning when harvest sites are selected, which is a separate and distinct level of decisionmaking from the decision to approve a Forest Plan.

The regulation at CFR 219.3 defines "cost efficiency" as "[t]he usefulness of specified inputs (costs) to produce specified outputs (benefits). In measuring cost efficiency, some outputs, including environmental, economic, or social impacts, are not assigned monetary values but are achieved at specified levels in the least cost manner." Therefore, "cost efficiency" takes into account both priced and non-priced values.

In reviewing the record with respect to below-cost sales, we conclude that the timber sale program has multiple objectives such as providing a variety of recreational experiences, and services to the public while assuring protection of soil, water, visual, and cultural resources (ROD pages 3, 6, 20 and 21); that the Forest will not attempt to offer timber volumes in excess of actual timber demand (Forest Plan, page 2-5; ROD, page 19); and that the Forest recognizes the need to reduce program costs while still providing an appropriate level of nontimber multiple-use objectives (ROD, page 20). The Regional Forester recognizes that below-cost sales may occur under the provisions of the LRMP (DEIS, pages 2-85 through 2-87; FEIS, pages 2-18 and 19; ROD, pages 20-21), provides an explanation of why he believes that the LRMP will maximize net public benefits (ROD, pages 4-7) and discusses efforts to cut costs and raise revenues in order to reduce the incidence of below-cost sales (ROD, pages 26-30).[1] Although timber costs are projected to exceed timber revenues for the planning horizon (DEIS, table 2-33, page 2-82), the timber sale program proposed for the first decade does not represent an increase over recently experienced levels.

The rationale for conducting these sales and the factors affecting the cost efficiency of using the timber program to achieve non-timber benefits are discussed in the DEIS (pages 2-77 through 2-87) and the ROD (pages 20-21 and 26-29).

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[1] Throughout the decision the DEIS is cited. Although usually a FEIS totally supersedes the DEIS, the FEIS for the Wayne National Forest is "abbreviated" and incorporates the information of the DEIS. The DEIS therefore contains large portions of the final NEPA documentation and is cited as such throughout this decision.

Conclusion

The Regional Forester is affirmed. We find no reason to amend the Forest Plan with respect to below-cost sales. Although you disagree with the criterion used to approve the plan, the record substantiates that the Regional Forester acted properly in arriving at the decision. Even though the Regional Forester chose an alternative that allowed for below-cost timber sales, the record (ROD) shows he fully considered this issue, and made a decision that was reasonable and consistent with legal requirements.

B. Suitability Determination and the MacCleery Decision

This contention has two aspects. The first is whether or not the planning regulations on suitability (36 CFR 219.14) comply with Section 6(k) of the National Forest Management Act (NFMA). The second is whether or not the Wayne National Forest followed the procedures established by the regulations.

The appellants' assertion that the process in the planning regulations for determining suitability is per se in violation of NFMA is not an appealable issue. Only decisions by Forest Officers are subject to appeal under 36 CFR 211.18. The NFMA regulations were promulgated by the Secretary of Agriculture and thus not subject to appeal.

Moreover, contrary to the appellants's assertion, NFMA does not require land management plans to identify lands unsuitable for timber production based on an absolute standard of economic returns to timber management alone (SOR, page 23). Economic efficiency is identified by NFMA as one of several factors influencing the suitability determination (16 USC 1604 (k)). As part of this determination, alternative timber

management prescriptions are developed for individual timber stands, and their costs and returns are calculated and compared. Investments in timber management, however, often produce benefits for other resources and highly productive timberland may have attributes desired for other resource uses as well. The determination of suitable lands must take into account the interrelationships among timber and non-timber resources and among the various geographic areas in the Forest in achieving a desired mix of goods and services from the entire Forest. Therefore, the natural and practical place to make the determination of the land's suitability for timber production is when Forest-wide alternatives (each reflecting a different mix of goods and services) are developed for the Forest Plan. The process in 36 CFR 219.14 for determining suitability ensures that land is selected for timber management in such a way that the multiple-use goals and objectives of the Forest Plan are achieved in the most cost-efficient manner possible.

The appellants assert that the economic and environmental evaluation of land suitability must be done on a site-specific basis. The Responsive Statement provides cross-references to the DEIS to show how site characteristics were used to evaluate direct costs and benefits of timber harvesting and to develop the timber management prescriptions for the comparison of costs and returns (RS, pages 10-13). Although the appellants maintains that site-specific characteristics should have been analyzed for "each harvest area" (SOR, page 13) rather than analysis areas, this level of specificity is appropriately left to subsequent project planning when harvest sites are selected.

As we explained earlier in this decision, the Forest Plan is a programmatic document which identifies factors that the Forest

Service will consider in making future decisions. Unless it specifically provides otherwise, the Forest Plan does not commit the agency to undertake any ground disturbing projects. It set forth guidelines, prescriptions, and standards to govern site-specific projects such as individual timber sales.

It is during the implementation of Forest Plans that costs and benefits of alternative methods to carry out timber sales are evaluated on an individual sale basis. For each proposed sale, a no action alternative, which has no timber harvesting, is also considered. Specific information related to current timber prices as well as the costs of timber harvesting are available to support judgments about the practicality of specific timber sale proposals and to support final decisions of whether or not to proceed with specific timber sales.

The appellants also contend that the Wayne Forest Plan justifies a costly timber harvest and road building program as a means to achieve recreation and wildlife benefits that are not needed. "The Final Plan does not address adequately the need for the purported multiple use benefits to be derived from timbering" (SOR, page 33). "By adhering to imposed goals for timbering without conducting an economic analysis of alternative goal formulations, the final plan violated Department of Agriculture policy, as contained in the MacCleery Decision" (SOR, page 34).

The MacCleery decision stated the principle that:

> A particularly strong obligation is imposed on the Forest Service to explain the economic, social and environmental tradeoffs which are likely to occur when resource objectives or responses to public issues are proposed which would reduce economic efficiency (reduce present net value). (USDA Deputy Assistant Secretary's Decision on Review of Administrative

> Decision by the Chief of the Forest Service Related to the Administrative Appeals of the Forest plans and EISs for the San Juan National Forest and the Grand Mesa, Uncompahgre, and Gunnison National Forest, July 31, 1985, page 6.)

The situation on the Forests that gave rise to the MacCleery decision was the expansion of a timber program where the direct costs associated with increasing timber sales above recent sale levels exceeded the expected revenues over the entire planning horizon (the overall time period considered in the planning process which in this case is 50 years). In the case of the Wayne National Forest, however, the timber sale program proposed for the first decade does not represent an increase over recently experienced levels. The benchmark analyses in the DEIS indicate that allowing timber harvests to expand to meet timber demands would increase present net value over the 50-year planning horizon (DEIS, page 2-78, page B6-42). The maximum PNV (present net value) Benchmark, Alternatives 1, 2, and 6 all have a higher PNV than the preferred alternative (which became the Plan). Alternatives 1 and 6 also display higher levels of timber harvest than the preferred alternative. The Regional Forester explains the tradeoffs in present net value that were accepted in order to develop a Forest Plan that was more responsive to public desires for non-priced benefits (ROD, page 29).

The timber sales program in the Wayne Forest Plan does not fit the factual situation addressed by the MacCleery decision. The Regional Forester acknowledges, however, that in some proposed sales the cost of accessing and preparing timber sales will exceed receipts (ROD, page 21). The rationale for conducting these sales and the factors affecting the cost efficiency of using the timber program to achieve non-timber benefits are discussed in the DEIS (pages, 2-85 to 2-87) and

the Regional Forester's responsive statement (pages, 5-7). These discussions address many of the factors noted in the MacCleery decision, including initiatives to lower the cost of timber harvesting, the relative efficiency of alternative vegetation management techniques, and the need to use timber harvesting to achieve non-timber management objectives.

We now turn to the second aspect of the issue and examine whether the Wayne National Forest followed the procedures established by the regulations. The suitability procedures are described in the planning regulations in paragraphs 219.14(a) through 219.14(d).

The appellants allege that the procedures used by the Wayne National Forest to determine the suitability of lands for timber production are driven by the need to meet predetermined timber production goals and will allow large areas of physically and economically unsuitable lands to be included in the timber base. Noting the steep slopes of the Wayne National Forest, the appellants state that the Forest Service has not adequately justified classifying only 1,160 acres as physically unsuitable (SOR, pages 27-28).

The record shows that the Wayne National Forest completed all three stages. The Forest's description of the suitability process is found in the DEIS (page 2/75; 4/58; Appendix B, pages 3/37-39). The general process used for formulating alternatives is contained on page 2-1 of the DEIS.

The criteria applied by Forest planners to identify lands with physical or environmental limitations for timber production are shown in Appendix B (pages B3-37 to B3-39) of the DEIS, and the Land Classification Summary (Plan, chapter 4, page 7). The Regional Forester, in his Responsive Statement, provides a cross reference from planning documents on the

physical suitability analysis conducted as part of the Forest planning process (RS, pages 10-12). With the information developed through the physical suitability analysis, criteria were developed by an interdisciplinary team of resource specialists based on years of experience on the Wayne National Forest and available research. The criteria included topography, soil characteristics, and other physical features of the Forest. Our review of the record indicates that Forest planners considered the problems associated with timber harvesting on steep slopes and applied reasonable criteria to determine which lands were unsuitable for timber production. Based on their evaluation, they excluded some lands from timber management and provided specific standards and guidelines to protect other areas.

Conclusion

The Regional Forester is affirmed. The process used to determine lands suitable for timber production on the Wayne National Forest is consistent with the requirements of 36 CFR 219.14.

C. Even-aged Versus Uneven-aged Management

The appellants charge that the Wayne Forest Plan fails to support clearcutting as the optimum method of harvest in violation of applicable laws and regulations (SOR, page 36).

As previously discussed, the Forest Plan identifies through the management prescriptions the desired future condition of the Forest and sets the stage for project or activity review, but does not provide the last word. Forest Plans are not a collection of individual project decisions which create irretrievable commitments of resources. Such Plans would inhibit use of new information, responses to changes in demands and needs, adoption of new technology, and response

to evidence from monitoring. It is during Forest Plan implementation that we determine management practices to meet overall goals and objectives consistent with the Plan's standards and guidelines. Decisions at the project planning level and the Forest Plan monitoring and evaluation processes provide for regular reviews to ensure validity of planning assumptions.

The Wayne Forest Plan, Appendix C includes a thorough discussion of harvest methods that are considered for use and demonstrates that even-aged management, primarily clearcutting, is the method usually most suited to meeting alternative objectives in the Forest types common to the Wayne National Forest. However, the Regional Forester in his Responsive Statement (pages, 17-19) says that . . . "the Forest Plan has established a programmatic system for future management decision making and that the silvicultural systems chosen in the Forest Plan do not constitute a decision to take action on the ground. Those decisions are made for individual site-specific [projects] when implementing a Forest Plan." Site-specific determinations at the project level must be made with public involvement and documented in accordance with NEPA procedures. These decisions are subject to administrative appeal.

The optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the Forest to achieve specific management objectives. The Forest Service Land and Resource Management Planning Handbook (FSH 1909.12), however, clearly provides that certain specific findings required by NFMA, including determinations on the appropriateness of even-aged management and the optimality of clearcutting, must be made

and documented during Forest Plan implementation on a project-by-project basis.

Conclusion

The Regional Forester is affirmed. The Forest Plan does not make the site-specific finding required by NFMA that clearcutting is the optimum method for harvesting. While clearcutting is allowed it is not mandated by the Forest Plan. The final decision on which harvest method will be used on a particular site will be based on a site-specific silvicultural prescription and interdisciplinary review. As the Forest Plan is implemented, the Regional Forester must ensure that alternative cutting methods to meet site-specific conditions and objectives are considered before making a finding that clearcutting is the optimum cutting method.

D. Timber Harvest Level

Appellants argue that the Wayne National Forest ". . . because of its unique geographic feature of soil, slope and watershed conditions, is not capable of maintaining a long term sustained yield of timber" (SOR, page 46). The appellants contend . . . "the Wayne Forest is not suitable for such an extensive harvest level as described in the Forest Plan and as a result, the Plan violates relevant law and the implementing regulations" (SOR, page 47).

In addition, the appellants contend, "the public is generally opposed to the level of timber harvest scheduled under the plan. However, the Forest Service has largely ignored this type of public input" (SOR, page 45).

It is important to note that ASQ in the Forest Plan is the upper limit for timber outputs for the plan period, not actual proposals for timber sales offerings. The Forest Plan makes no promise or assurance that the outputs for any resource, including timber, will actually occur at the projected level. The annual timber sale offerings depend on factors such as budget, markets for wood products, and other conditions which may limit the practicability of offering sales at levels displayed in the Forest Plan. These factors cannot be foretold with certainty. In addition, Forest Plan revisions or amendments may set new management direction in the future. Forest Plans must be revised each 10 to 15 years (16 U.S.C. 1604) and with each revision all resources are reanalyzed pursuant to 36 CFR 219.12 in the light of new or changed conditions. In the case of the timber resource, sale levels lower or higher than the previous Forest Plan's levels could be adopted as a result of the changed conditions and new management direction.

The ASQ established by the Forest Plan is well below the estimated long-term sustained-yield capacity of the Forest. In the first decade, the annual average ASQ is 7.5 MMBF; it is projected to raise to 16.8 MMBF by the fifth decade. The long-term sustained-yield capability of the Forest under the management described in the Forest Plan is 18.4 MMBF per year in each decade (FEIS, page 1-10; ROD, page 19).

The Regional Forester has used the analysis phase of the planning process to identify public demands and various options to provide an appropriate mix of goods and services consistent with appropriate laws, regulations, and productivity of the natural resource base. The ROD (pages 10-23) discusses the management problems developed from the public issues and management concerns raised during the scoping

process. Timber harvest levels was one of the management problems addressed.

In considering which alternative best maximizes net public benefits, the Regional Forester examined public preferences, benefits and costs, as well as environmental effects, and social and economic implications of the alternatives with respect to multiple uses and other resource issues (ROD, pages 7-24). The logic and rationale leading to the Regional Forester's decision on the appropriate mix of resource uses and allocations are adequately stated.

While the appellants (and some others commenting on the Forest Plan) believe the timber harvest level should be reduced, the results of the various public involvement activities indicate there are other members of the public who disagree (see FEIS, pages 2-15 through 2-23). The Wayne National Forest supplies the local economic impact area with 40 percent of the annual log requirements (ROD, page 19). The mills in the area provide local job opportunities and community stability supporting traditional lifestyles (DEIS page 2-106). In addition the harvest program contributes to providing desired wildlife habitat as well as a broad range of dispersed recreation opportunities. With these considerations in mind, we do not believe that undue emphasis is placed on timber management; nor is the timber management program inconsistent with the Multiple Use Sustained Yield Act (MUSYA). Furthermore, the long time sustained yield (LTSY) was based on the acres suitable for timber production. As we discussed at page 7 of this decision (Issue 1 B) the interdisciplinary characteristics of lands in determining which lands were physically suited to timber production. Land not physically suited to timber production is therefore not considered in determining the LTSY. The planners'

consideration of the physical characteristics is well documented in appendix B (pages B3-37 to B3-39) of the DEIS.

Conclusion:

In adopting an alternative that maximizes net public benefit, the Regional Forester has met the requirements of the MUSYA, NEPA, NFMA, and the implementing regulation 36 CFR 219. The Regional Forester is affirmed.

Conclusion on Issue:

Our analysis of this issue concluded that the conditions of the Forest Plan for the Wayne National Forest are sufficiently different from the San Juan/GMUG National Forests and the MacCleery guidelines do not apply. The Regional Forester has explained (in the Record of Decision) his rationale for the proposed vegetation management program, efforts to reduce timber management costs and raise revenues, and the circumstances under which timber sale levels would increase or decrease.

The Regional Forester explains his reasons for believing that the Wayne Forest Plan will maximize net public benefit in the ROD, principally on pages 7 to 24. He states (page 4) that "in making the decision, a determination of net public benefits cannot be reduced to any kind of single index for comparison of the alternatives." He goes on to discuss how the Forest Plan responds to a variety of different management problems, the compatibility of the Forest Plan with the plans of other entities, the potential for controversy, cost efficiency, and the environmental consequences of the Forest Plan. The ROD evidences a well-reasoned decision and therefore, the Regional Forester is affirmed.

We conclude that the Forest Plan, DEIS, and FEIS satisfy the requirements of NFMA with respect to the planning level evaluation of harvest methods. Clearcutting may be selected as the appropriate harvest method for a project only when it is determined to be the optimum method. This determination will be made during project-level analysis consistent with the NEPA process.

ISSUE 2. WHETHER THE FOREST PLAN VIOLATES NEPA.

The appellants raise two EIS concerns regarding NEPA. First, they assert that the Forest Plan has failed to consider a reasonable range of road construction alternatives. Second, appellants assert that the NEPA regulations require the cumulative effects of the planned road construction on the Forest's environment be considered.

A. Appropriate Range Of Alternatives

Appellants contend that the Forest Plan EIS has failed to consider a reasonable range of road construction alternatives and, therefore, violates NEPA.

Appellants argue that given the importance of the issue of below-cost sales to the public, "[t]here simply must be alternative methods for timber harvest support rather than building more roads" (RRS, page 12).

The purpose of a Forest Plan is to provide for management of all multiple uses of a unit of the National Forest System (16 U.S.C. 1604(e)(1)). Pursuant to the NFMA regulations, "[t]he primary goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and

management requirements of section 219.13 through 219.27" (36 CFR 219.12(f)). Alternatives prepared for consideration as a Forest Plan are to provide a range of reasonable management scenarios for the various resources in response to the identified public issues, management concerns, and resource opportunities. Further, NEPA regulation 40 CFR 1502.14(a) requires the Forest Service to ". . . explore and objectively evaluate all reasonable alternatives . . . ."

In developing a Forest Plan for a 10- to 15-year planning period, there are virtually an infinite number of alternatives that could be evaluated in detail. Consideration of all of these is obviously an impossible task. With this in mind, the planning regulations contemplate development of a reasonable range of alternatives. The range of alternatives developed for management of the Wayne National Forest was defined ". . . by the range of responses necessary to address the major public issues, management concerns, and resource opportunities identified during the Forest planning process . . ." (FEIS, Chapter II, page 6). Each alternative has a mix of goals and objectives in response to management problems and consists of ". . . the most economically efficient set of prescriptions needed to meet these goals and objectives" (FEIS, Chapter II, page 5).

As mentioned previously, alternatives are to provide for a wide range of management scenarios for the various uses of the National Forest. Therefore, alternatives cannot be completely specified by a single output such as miles of road construction. Output levels, such as miles of road construction, contribute to the development of management scenarios but are not, in themselves, alternatives. Estimates of output levels for the various resources, within the alternatives, are presented to assist the public to better understand possible consequences of

implementing a particular alternative. Output levels themselves are not subject to the NEPA requirements for a reasonable range of alternatives.

In developing a Forest Plan, it is reasonable to expect that alternatives designed to meet the established goals and objectives (which are developed to meet the intent of the regulations) on an already managed National Forest may produce similar results. The Forest Plan does demonstrate variation in management emphasis between alternatives. The fact that some of the alternatives have similar outcomes regarding projected resource outputs does not, by itself, establish a violation of the NEPA, Natural Resources Defense Council (NRDC) v. Hodel, 624 F. Supp. 1045, 1053 (D. Nev. 1985), aff'd, Natural Resources Defense Council (NRDC) v. Hodel, 819 F.2d 927 (9th Cir. 1987).

Conclusion:

Given that the range of alternatives that could be examined is infinite, those that are considered in the FEIS must be defined by resource potentials, public issues and concerns, tradeoffs, and environmental consequences. We conclude that the alternatives presented meet these requirements and were of sufficient detail to allow the Regional Forester to make a reasoned choice among alternatives. The Regional Forester is affirmed.

B. Cumulative Effects

Appellants cite the NEPA regulations and state that these require that the cumulative effects of the planned road construction on the Forest's environment be considered (SOR, page 41).

During the scoping process, Forest planners identified the magnitude, location and effects of road construction as major public concerns (DEIS, Appendix A). The cumulative effects of road construction and reconstruction are evaluated by alternative in terms of land uses, soils, visuals, water quality, wildlife habitat, and other environmental conditions in the DEIS (pages 4-49 through 4-71).

Cumulative impacts are covered in CEQ regulations on the scope of an EIS (40 CFR 1508.25). This section requires that an EIS address the direct, indirect, and cumulative impacts of proposed actions. "Cumulative impact" is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . ." (40 CFR 1508.7). As we have discussed earlier, the Forest Plan provides the framework for future management of the National Forests and does not usually make site-specific project decision. The EIS for a Forest Plan is, therefore, programmatic in nature. As described above, the scope of the action being considered in this instance does not involve an irretrievable commitment of resources. Thus, cumulative impacts of site-specific decisions need not be discussed at the Forest Plan level as long as they are discussed before a decision is made which results in an irretrievable, irreversible commitment of the resource. In this case, cumulative effects must be addressed before the final commitment is made at the project level.

Conclusion on Issue:

The Regional Forester is affirmed. The range of alternatives presented in the FEIS represents reasonable management scenarios for the various resources of the Forest and complies with NEPA's requirement for a reasonable range of alternatives. We conclude that the cumulative effects presented

in the EIS for road construction are sufficient, given the nature and scope of the decision to approve the Forest Plan. We emphasize, however, that cumulative effects analysis must be completed for site-specific projects or activities prior to any irretrievable and irreversible decision. The Regional Forester's decision is affirmed.

ISSUE 3. Whether the Forest Plan is based on an adequate assessment of wildlife diversity.

Appellants contend that the Forest Plan will destroy wildlife diversity by promoting early successional habitat, which is already overabundant in Southeast Ohio, to the detriment of mature Forest which is in short supply. "[C]onsequently, this will result in even less wildlife diversity. This wildlife strategy is premised on a misreading of the diversity provision of the NFMA . . ." (SOR, page 52). To support this contention, the appellants make the following points in their SOR:

A. The wildlife strategy focuses almost exclusively on the use of timber harvesting to increase early successional Forest habitat (SOR page 52).

B. The Plan fails to consider the consequences of roads, fragmentation and edge effects on wildlife species requiring mature Forest (SOR page 58).

C. The Plan misuses the concept of management indicator species which results in a bias toward early successional species (SOR page 65).

In support of the above contentions, the appellants present their view of the NFMA provisions, the accompanying regulations, and Congress's intent as they view them pertaining to diversity. The appellants maintain that these provisions require that the Forest Plans provide for the diversity of plant and

animal through maintenance of the Wayne National Forest's natural environment. The appellants criticize the Forest Plan in general for not meeting the intent of these provisions as they interpret them.

The diversity provision of the NFMA must be read in context with the other requirements of the law. Before we discuss appellants' specific contentions, it is important to describe the Agency's concept of diversity under the provisions of the NFMA and its regulations.

BACKGROUND ON THE DIVERSITY IN FOREST PLANNING

The National Forest Management Act of 1976 provides statutory direction for managing the National Forest System to provide for diversity of plant and animal communities. Section 6(g)(3)(B) of the NFMA, the diversity provision, states:

> The [planning] regulations shall include, but not be limited to . . . (3) specifying guidelines for land management plans developed to achieve the goals of the [RPA] Program which . . . (B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan.

The legislative history of the NFMA indicates that the two basic parts of the diversity provision resulted from concerns about large scale Forest type conversions and the associated effects on plants and wildlife communities. (See specifically: (1) April 27, 1976, Senate Committee on Agriculture and

Forestry and Senate Committee on Interior and Insular Affairs, Transcript of Proceedings, S. 3091, As Amended, pp. 51-54, (2) H.R. Report No. 1478, part 1, 94th Congress, Second Session, p. 31, and (3) Senate Report No. 1335, 94th Congress, Second Session, pp. 26-27).

The diversity provision of the NFMA must be read in context with the other requirements of the law. Section 6 of the NFMA requires that each Forest Plan provide, in a single set of documents, the overall management direction and guidelines for management of the applicable National Forest for a period of 10-15 years (16 U.S.C. 1604(f)). The NFMA requires that the Forest Service apply a systematic, interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences in the preparation and implementation of Forest Plans (16 U.S.C. 1604(b)). The Forest Plan is to ensure coordination of all multiple uses: outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness (16 U.S.C. 1604(e)). These and the other provisions of the NFMA must all be read together to promulgate and maintain a land and resource management plan. Diversity is one of a multitude of factors that must be considered in developing Forest Plans that "provide for multiple use and sustained yield of the products and services obtained (from the applicable National Forest) in accordance with the Multiple-Use Sustained-Yield Act of 1960" (16 U.S.C. 1604(e)(1)).

To ensure an adequate consideration of diversity consistent with section 6(g)(3)(B), the implementing regulations (36 CFR 219) address diversity at several points. First, the regulations provide a definition of diversity to guide land and resource management planning:

> 36 CFR 219.3 Definitions and terminology. For purposes of this subpart the following terms, respectively, shall mean: . . . Diversity: The distribution and abundance of different plant and animal communities and species within the area covered by a land and resource management plan.

Other sections of the regulations where the term "diversity" is used are:

> 36 CFR 219.26 Diversity. Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices.
>
> 36 CFR 219.27 Management Requirements. (a) Resource Protection: All management prescriptions shall-- (5) Provide for and maintain diversity of plant and animal communities to meet overall multiple use objectives, as provided in paragraph (g) of this section:
>
> (g) Diversity: Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities, including endemic and desirable naturalized plant and animal species, so that it is at least as great as that which would be expected in a natural Forest and the diversity of tree species similar to that existing in the planning area. Reductions in diversity of plant and animal communities and tree species from

> that which would be expected in a natural Forest, or from that similar to the existing diversity in the planning area, may be prescribed only where needed to meet overall multiple use objectives. Planned type conversion shall be justified by an analysis showing biological, economic, social, and environmental design consequences, and the relations of such conversions to the process of natural change.

Regulation 36 CFR 219.26 establishes minimum requirements for integration of diversity throughout the Forest planning process, and 36 CFR 219.27 establishes requirements for resource protection and enhancement of diversity.

These requirements direct that, for the planning area (the area of the National Forest System covered by a Forest Plan): (1) information is to be collected, (2) diversity is to be considered and evaluated, (3) management prescriptions are to provide for diversity (where appropriate and to the extent practicable), and (4) reductions in diversity--including type conversions--are to be justified in terms of overall multiple-use objectives.

The Forest Plan establishes the requirements, vision, and expectations for the diversity of plant and animal communities that best meet overall multiple-use goals and objectives for the planning area. The Forest Plan guides project implementation through Forest-wide standards and management area prescriptions. Activities and projects must be consistent with the Forest Plan.

Monitoring and evaluation of the collective effects of all projects and activities, including the addition of new information, will determine if Forest-wide requirements are being met and whether adjustments in the Forest Plan are required to meet overall multiple-use objectives.

EVALUATING DIVERSITY

The regulations call for diversity to be considered throughout the planning process (36 CFR 219.26). The diversity provided by a Forest Plan is evaluated by determining how that Forest Plan has considered the distribution and abundance of plant and animal species and communities to meet its overall multiple-use objectives. Several of these objectives are clarified by 36 CFR 219.

Specifically, Forest planning shall provide that:

A. Management direction contributes to recovery and conservation of federally listed threatened or endangered species (Endangered Specifies Act, 36 CFR 219.19).

B. Management of habitat provides for the maintenance of viable populations of existing native and desired nonnative wildlife, fish (36 CFR 219.19), and plant species (USDA Regulation 9500-4) well distributed throughout their current geographic range within the National Forest System. As interpreted by the Secretary, this means that LRMP's should identify or be amended to identify known sensitive species and provide Forest Standards and Guidelines that ensure conservation when an activity or project is proposed that would affect the habitat of a sensitive species (USDA Decision on Review of Administrative Appeals of the Beaverhead NF LRMP by John L. Evans, August 17, 1989).

C. Management of plant and animal communities identified in Regional Guides or Forest Plans as issues that warrant special measures achieve overall multiple-use objectives (36 CFR 219.8, 219.12(b), 219.27).

D. Management direction includes objectives for selected management indicator species (36 CFR 219.19). The Forest Plan should specify for plant and animal species and/or communities identified as major Forest Plan issues or management indicators:

1. Standard and guidelines for protection, viability, recovery, or restoration as appropriate to meet overall multiple-use objectives (36 CFR 219.27);

2. The expected future conditions in terms of distribution and abundance of populations or habitats to meet overall multiple-use objectives (36 CFR 219.11, 219.26);

3. The schedule for monitoring and evaluation of standards, guidelines, and objectives for plant and animal species and communities (36 CFR 219.27); and

4. A discussion of any proposed type conversions. If any conversion results in a reduction in diversity, explanation must be provided to explain why the conversion is necessary to achieve multiple use objectives (36 CFR 219.27).

We now turn to the specific concerns expressed by the appellants about diversity.

A. The Use Of Timber Harvesting To Increase Habitat

Within the argument that the Forest Plan fails to insure species diversity, appellants contend that the Forest Plan's focus is on the use of timber harvesting to create wildlife habitat which increases early successional habitat while decreasing old growth habitat. The appellants maintain that the timber

program will benefit many of the animal species already found in private lands surrounding the Forest while adversely affecting . . . "Forest interior species, especially the key, regionally scarce wildlife species" (SOR, page 59). The resulting "highly altered and fragmented landscape" will . . . "bear little resemblance to the Forest's natural diversity of communities" (SOR, page 58).

As discussed in the previous section, the NFMA, Section 6(g)(3)(B) requires Forest Plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives" and, where appropriate and to the extent practicable, "to preserve the diversity of tree species similar to that existing in the region controlled by the plan." The legislative history of the NFMA indicates that this provision resulted from concerns about large scale Forest type conversions and the associated effects on plants and wildlife communities. We do not find support in the Act or its legislative history for the assertion that Forest Plans were expected to achieve diversity by maintaining an undisturbed environment; nor do we find that using even-aged timber management to achieve a distribution of timber age-classes and wildlife openings is in any way inconsistent with the requirements in the Act.

It is important to note that, although the natural Forest is used in the regulations as one point of reference for evaluating diversity, the regulations do not imply that diversity can only be achieved by preservation of the existing environment. Rather, the diversity provided by a Forest Plan is evaluated by determining how that plan has considered the distribution and abundance of plant and animal species and communities in meeting its overall multiple-use objectives. Diversity

establishes no additional requirements beyond those identified for management indicator species, for population viability of sensitive species, for the recovery of threatened or endangered species of plants and animals, and for protection of special habitat. The Forest has addressed these points throughout the Forest Plan (pages 4-38 through 4-50, appendix B), EIS (chapter 3 and 4), and as such, has met the requirements of the regulations consistent with the multiple-use objectives of the planning area as expressed in each alternative (36 CFR 219.26).

The Wayne Forest Plan includes Forest-wide standards and guidelines for threatened and endangered species, sensitive species, and special habitats (Plan, pages 4-28 through 4-50). Issues related to vegetative management and wildlife habitat diversity were identified early in the planning process as management problems. The Regional Forester points out that as a result of public comments received on the DEIS changes were made in the Forest Plan to give more emphasis to large, continuous forest tracts and associated wildlife species (ROD, page 6). The cerulean warbler was added as a Management Indicator Species (MIS) for older hardwood forest. The Forest Plan designates management indicator species, establishes population objectives for them, and includes provisions to monitor population and habitat changes (Forest Plan, Appendix B and pages 5-8 and 5-9).

B. Consequences of Road, Fragmentation, and Edge Effects

Appellants contend that populations preferring large blocks of natural Forest habitat are being ignored in favor of species favoring early successional habitat. Road construction and timber harvesting . . . "will fragment areas of older Forest and isolate species dependent on that habitat" (SOR, page 53).

"[T]he increased fragmentation resulting from the Plan . . . favors edge and transient species at the expense of species requiring stable, mature Forest habitat" (SOR, page 63).

Appellants have provided a general discussion of the negative effects of clearcutting and road construction such as fragmentation and edge effect. The appellants express their concern for "the many bird species" which they believe will be affected by roads and related management activities.

The Regional Forester responds that the Forest has recognized Forest fragmentation and road density concerns from the onset of the planning process. As a result of comments received on the Draft Forest Plan, "changes have been made in the Final Plan to give greater emphasis to old-growth Forest and provide more large, unbroken areas of mature and overmature hardwoods" (FEIS, page 2-27).

The Forest planning regulations provide that the interdisciplinary team shall consider how the abundance and distribution of different plant and animal communities and species will be affected by various mixes of resource outputs and uses (36 CFR 219.3 and 219.26). The Wayne National Forest Plan provides direction for managing old growth habitats in Management Areas 6.2 and 6.3 (Plan, pages 4-124 through 4-129). Issues related to wildlife management and large areas of old-growth forest were identified in the planning process and are addressed in the FEIS (chapter 2). The Forest Plan designates management indicator species and includes provisions to monitor population and habitat changes (Plan, Appendix B and pages 5-8 and 5-9). The Regional Forester recognized the need to provide a "wide variety" of habitats, including old-growth forests to support all wildlife and fish species (ROD pages 15 and 16).

C. Management Indicator Species

Appellants contend the "indicator species as selected heavily favor species requiring early successional habitat such as openings or Forest edge rather than interior Forest species requiring late successional habitat" (SOR, page 54).

It should be emphasized that management indicator species serve a special function for evaluating the efforts of the Forest Plan's management direction on plant and animal populations and habitat (36 CFR 219.19). They should not be interpreted as the only species of concern when management activities are undertaken. The effects of management activities on fish and wildlife habitat are evaluated through the selected management indicator species. Our review indicates that the Forest Plan identified a variety of management indicator species which were selected to meet the criteria identified in the Forest planning regulations. In cooperation with the Fish and Wildlife Service, the Ohio Department of Natural Resources, and nine different universities, Wayne National Forest planners identified the principle habitat components of all plants and animals (mammals, birds, reptiles, amphibians, and others) that occur in the Forest. Through this process representative species were then selected as Forest indicator species for all habitat types (see Plan, Appendix B). Forest Planners explained their reasons for selecting certain management indicator species in the DEIS (pages, 3019 to 3-21) and Appendix B. The Final Plan gives more emphasis to old-growth forests and associated forest wildlife (ROD page, 16). As a result of the added emphasis on old-growth forests, the Cerulean Warbler was added as an indicator species of this habitat type (FEIS pages 2-38 through 2-39).

There is no evidence that implementation of the Plan would result in a failure to comply with 36 CFR 219.27 for any

species. The Regional Forester applied a process/interpretation that was valid and consistent with the Forest Service planning process.

Conclusion on Issue:

The Wayne Forest Plan provides for diversity in accordance with the requirements of NFMA and the planning regulations. The Regional Forester is affirmed.

The Plan strives to balance habitat requirements for a wide variety of wildlife species. The MIS selected for monitoring in the Forest Plan reflect all the biotic communities in the Forest that will or could be affected by proposed management in the Forest Plan.

Openings created as a result of even-aged timber management obviously change the Forest environment and favor some plant and animal species over others at affected sites. It is not evident, however, that the amount, timing, location, and standards for even-aged timber harvests under the Forest Plan will have adverse effects on the abundance and distribution of plant and animal species Forest-wide. As individual projects are proposed, among the effects to consider in deciding whether or not to go ahead with a project will be the effects on wildlife and plants.

With respect to the requirements for monitoring activities, the Plan identifies "population trends" of MIS as well as acres of suitable habitat for monitoring. In addition, the Forest Plan indicates that evaluation of monitoring results will occur on an annual and 5-year basis. The monitoring portion of the Plan meets the direction of 36 CFR 219.12 and 36 CFR 219.19(6).

ISSUE 4. WHETHER THE FOREST PLAN PROTECTS WATER QUALITY.

The appellants are concerned about the effects of clearcutting, road construction, and mining activity on water quality. The appellants contends that, to comply with NFMA, NEPA, and Federal and State clean water laws, the Forest Plan . . . "must have adequate data and undertake a thorough analysis of the impact of Forest management on specific water resources" (SOR, page 69).

Since the Forest Plan does not make decisions on specific projects, it is not possible or appropriate for the EIS to analyze site-specific impacts of timber harvesting, road construction, or other projects on individual streams.

Site-specific data on existing stream conditions are available and are used for project-level planning (RS, pages 41-43). Interdisciplinary teams analyze the site-specific environmental effects, including cumulative effects, of each proposed management activity in accordance with NEPA procedures before a decision is made to proceed with a project. The Regional Forester emphasizes that mitigation measures will be monitored to confirm their effectiveness or to show the need for changes in management practices of the Forest Plan (ROD, page 39)

Forest-wide standards and guidelines require the maintenance of water quality and instream uses and compliance with State water quality management plans and applicable provisions of the Clean Water Act of 1977 (Plan, pages 4-28 through 4-38). Forest Plan Appendix F (Soil Limitations To Vegetative Management Activities) discusses mitigation measures or limitations on activities that may be needed to protect water and soil resources under various soil, slope, and vegetation

conditions. Standards and guidelines are applied during the development and implementation of all projects that may affect water quality to protect individual streams.

Many of the concerns raised by the appellants on the cumulative effects of management activities are addressed in both chapter 2 and 4 of the EIS. For the most part, the environmental effects of management activities on water quality were not considered significant because of the mitigation measures required by Forest Plan standards and guidelines. Monitoring will determine whether the standards and guidelines and mitigation measures established in the Forest Plan are followed and are effective in protecting water resources.

Conclusion on Issue:

The standards and guidelines in the Wayne Forest Plan provide adequate direction for compliance with applicable laws and regulations on water quality and for the protection of water resources on the Forest. The Regional Forester is affirmed.

ISSUE 5. WHETHER THE FOREST PLAN VIOLATES NFMA AND 36 CFR 219 WITH RESPECT TO RECREATION AND WILDLIFE

The appellants maintain that planners for the Wayne Forest Plan gave preference in the planning process to timber production, and that the level of harvest in the Forest Plan will be detrimental to the recreation and wildlife resources.

The appellants construe the fact that 75 percent of the Forest has been identified as suitable for timber harvest while 10 percent is managed for semiprimitive recreation as evidence that timber production received priority consideration and recreation was inadequately considered in the Forest Plan.

Contrary to appellants' contention that the Forest Plan is legally required to provide a full range of recreation opportunities, there is no requirement in NFMA or its regulations that a Forest Plan must provide any specified level or type of outdoor recreation. The NFMA regulations at 36 CFR 219.21 require that: "[t]o the degree consistent with needs and demands of all major resources, a broad spectrum of Forest and rangeland related outdoor recreation opportunities shall be provided for in each alternative." Subsection (a), (b), (c), and (d) state the following procedural requirements:

(a) Forest planning shall identify -
  (1) The physical and biological characteristics that make land suitable for recreation opportunities;
  (2) The recreation preferences of user groups and the settings needed to provide quality recreation opportunities; and
  (3) Recreation opportunities on the National Forest System lands.

(b) The supply of developed recreational facilities in the area of National Forest influence shall be appraised for adequacy to meet present and future demands.

(c) Planning alternatives shall include consideration of establishment of physical facilities, regulation of use, and recreation opportunities responsive to current and anticipated user demands.

(d) In formulation and analysis of alternatives . . . interactions among recreation opportunities and other multiple uses shall be examined. The examination shall consider the impacts of the proposed recreation activities on other uses and values and the impacts of other uses and activities associated with them on recreation opportunities, activities, and quality of experience.

These requirements are procedural in nature. Information is to be collected, the recreation resource is to be evaluated, and each alternative is to consider a broad spectrum of outdoor recreation opportunities consistent with the needs and demands for all major resources.

Although none of the alternatives provide as much semi-primitive recreation opportunities as the demand estimates, all alternatives respond to the demand by increasing opportunities over current levels. Such consideration for anticipated demand meets the basic requirement of 36 CFR 219.21(c): "alternatives shall include consideration of . . . recreation opportunities responsive to current and anticipated user demands."

The appellants further state that the Forest Plan "commits the Wayne National Forest to massive timber production while ignoring the recreational needs of the people" (SOR, page 74) and that timber harvesting and road building will negatively affect the economic benefits of recreation (SOR, page 78). The appellants throughout their appeal have maintained that timber harvesting and road building are incompatible with the attributes of the Forest that attract other users, such as dispersed recreation opportunities, wildlife habitat, scenic beauty, and water quality. Specifically, they contend that the Forest Plan subordinates non-motorized recreation opportunities, visual quality, and wildlife to timber production.

The NFMA regulations require that ". . . plan shall provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner" (36 CFR 219.1(a)). There is no absolute measure of "long term net public benefits." The NFMA, 16 U.S.C. Section 1604(g)(3)(A), directs that the development of Forest Plans

include ". . . consideration of the economic and environmental aspects of various systems of renewable resource management . . . to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish."

Economic benefits and costs for some Forest uses, such as timber management, wildlife, and recreation, are measured by the present net value (PNV) concept (DEIS, pages 2-77 to 2-87). The tables in the DEIS (Page 2-91 to 2-94) compare timber harvest and recreation benefits provided by the Forest Plan with current management. Recreation opportunities under the Forest Plan shift to more non-motorized recreation uses, but the increased value related to the economic benefits of these uses does not compensate for the loss of benefits derived from the reduction in timber harvesting and developed recreation. (The same comparison can be made between wildlife improvements and timber harvesting.) Consequently, the PNV of the selected alterative is lowered. Looking only at PNV considerations, the Regional Forester would have cause to conclude that increasing rather than lowering timber harvest levels would add to the economic benefits from the Forest overall.

Of course, PNV calculations do not take into account all of the benefits provided by the Forest. The Regional Forester selected an alternative with a lower level of timber harvest and PNV than some other alternatives, with the acknowledgement that tradeoffs in PNV (or opportunity costs) are accepted in order to achieve other important non-priced benefits (ROD, page 27; DEIS, page 2-77).

Even though the appellants would prefer to see commodity production reduced lower than the levels in the Forest Plan, it is not apparent that this shift in multiple-use allocation on the forest would increase long-term net public benefits. Public

satisfaction with the balance between commodity and non-commodity Forest uses, as well as the environmental impacts of these uses, will be a matter of continuing review on the Wayne National Forest as part of the implementation, monitoring, and evaluation of the Forest Plan.

Conclusion on Issue

We conclude that the Forest Plan, DEIS and FEIS meet the provisions of 36 CFR 219 with respect to the issues raised by the appellants, and the Regional Forester is affirmed.

ISSUE 6. WHETHER THE FOREST PLAN'S ASSESSMENT OF THE VISUAL RESOURCE VIOLATES NFMA AND REGULATIONS

The appellants contend that the Forest Service has violated the NFMA and accompanying regulations by not properly considering the aesthetic and visual values in the planning process. To support this contention, appellants argue that:

A. The Forest Service failed to evaluate the public's visual expectations for the Wayne National Forest in violation of NEPA, NFMA and the regulations (SOR, page 81).

B. The Plan's visual quality objective "Maximum Modification" is a violation of the NFMA (SOR, page 84).

A. Compliance with the regulations pertaining to visual resources and evaluation of the public's visual resource expectations.

The appellants allege that the Forest Plan violates NFMA by failing to give the visual resource due consideration as a multiple use and Forest value equal with timber production and other Forest resources. As a result, appellants maintain that

Forest planners . . . "failed to consider both the landscape's visual attractiveness and the public's visual expectation" (SOR, page 83).

Public expectations for the visual resource on the Forest were considered in the formulation and evaluation of alternatives for the Forest Plan through the use of visual quality objectives. (Agriculture Handbook #462, Volume 2, Chapter 1 contains direction on the visual resource management system, including visual quality objectives.) Visual quality objectives reflect the degree of acceptable alternation of a characteristic landscape resulting from management activities (DEIS, page E-29). They take into consideration visual variety in the landscape, viewer sensitivity or interest in the scenic qualities of the landscape, and the relative distance of a landscape from an observer. The Regional Forester's responsive statement (pages 52-55) summarizes the process used to incorporate visual quality objectives into the evaluation of alternatives. The EIS displays for each alternative an estimate of the number of acres that would be in each visual quality objective category as a result of the proposed management activities (DEIS, pages 2-71 and 4-16 through 4-17). The EIS also discusses the consequences of road construction and even-aged/uneven-aged management on the visual resource in chapter 4.

The Regional Forester acknowledges in the ROD (Page 11) that "a large number of commenters on the DEIS and Proposed Plan" wanted to have more of the natural, undisturbed appearance of the Forest protected. In response to public concerns, Management Area 6.2 was increased from 11,200 acres in the Proposed Plan to 17,200 acres in the Final Plan in order to enhance semiprimitive nonmotorized recreation opportunities in these areas. In addition, Management Area 6.1 will provide 10,400 acres for semiprimitive, nonmotorized

recreation opportunities. While there will be evidence of human activities such as timber harvesting, these management practices must be in harmony with the natural-appearing forest landscape.

B. The Plan's treatment of the visual resource using a visual quality objective (VQO) of "Modification".

The appellants contend that, "The visual resource as provided for and treated under the plan and VQO of modification would clearly suffer effects which are irretrievable and/or irreversible" (SOR, page 88). The type of visual diversity and quality found in a mature natural Forest setting should be the benchmark against which proposed management activities are measured. The management practice of clearcutting "is in direct conflict with public expectation for visual quality found in natural appearing Forest" (SOR, page 89).

The Regional Forester responds that the Wayne National Forest Final Forest Plan incorporates VQO in accordance with the NFMA and the Forest Service Visual Management System. He goes on to say that in comparing change from the present, the Forest Plan "provides 24 percent more area in retention than present, 6 percent less in Partial Retention and 17 percent less in Modification and Maximum Modification. The net result is greater emphasis is given to enhancing visual management Forest wide, than previously" (RS, page 53).

In reviewing the record, we find that visual management has been addressed in the LRMP and FEIS. For instance, the Forest Plan had goals and objectives for visual quality, forest-wide standards, objectives for each management area, and a requirement to monitor visual quality objectives as they relate to vegetative management. The standards and guides developed in the Forest Plan are a result of the identification

of many of the concerns expressed by the appellants early in the planning process. The capability of the Wayne National Forest to fulfill public recreational expectations based on the existence of high density roads and scattered land ownership patterns was identified early in the issues, concerns, opportunities identification process (FEIS, Appendix A).

The appellants contend that the visual degradation permitted in the VQO category modification is essentially a violation of NFMA (SOR, page 84). The modification category is defined in the DEIS (page E-14) as follows: "management activities may dominate the characteristic landscape but must, at the same time, utilize naturally established form, line, color, and texture. It should appear as a natural occurrence when viewed in foreground or middleground." This definition complies with NFMA regulatory requirements for visual management (36 CFR 219.21(f)).

Although the Regional Forester has determined that even-aged management (in particular clearcutting or shelterwood harvest methods and a visual quality objective of modification) is preferred in selected management areas, the final determination of the appropriateness of these is yet to be made on a site by site basis. This determination will be accomplished through site specific analysis in compliance with NEPA and other relevant laws, regulations, and policies.

Conclusion on Issue

The Regional Forester is affirmed. The Forest Plan and FEIS have met the requirements of 36 CFR 219.21(f) with regard to the analysis and consideration of the visual resource. The final determination of the VQO for a site-specific area will be made and documented during project analysis.

The VQO assigned for a particular project will at least meet, and may exceed, the VQO assigned to the Management Area as a whole. You may participate in site-specific, project level decisions on these matters. You have opportunities to be notified, to obtain information, and to make your views known. Your participation is encouraged.

ISSUE 7. WHETHER THE FOREST PLAN RESPECTS THE CULTURAL RESOURCE REPRESENTED BY THE WAYNE NATIONAL FOREST.

The appellants contend that . . . "the Forest Service, like so many outside exploiters, has failed to consider what it is they are actually doing to the people who are part of the Appalachian culture" (SOR, page 92). "The Wayne is the major cultural resource of Appalachian Ohio. As a fundamental cultural resource, the Wayne must be preserved on a historic basis. The Forest culture that has existed for nearly two centuries cannot be lost forever to the methodology of timbering in the Plan" (SOR, page 94).

There is no requirement in Law or regulation that the Forest maintain the pre-settlement Forest or ecosystems originating on the land to preserve a particular historic, economic, social environment as a cultural entity or way of life as described by the appellants.

The character and nature of the economic and social environment were important considerations in the development of the Forest Plan. The DEIS (Chapter 3) provides a detailed description of the existing environment, the physical and biological characteristics, and the economic and social setting on the Wayne National Forest. It also includes a discussion of how the Forest management actions impact surrounding local

and State economies and lifestyles of the people. Chapter 4 of the DEIS (pages, 4-68 through 4-69) assessed the economic and social impacts for all the alternatives.

We find that the planning documents (i.e., DEIS, FEIS, Forest Plan, and ROD) provide ample evidence to conclude that the economy and lifestyles of the people surrounding the Forest were key considerations throughout the planning analysis and in selecting the Forest Plan alternative.

A second general concern that appellants have expressed is that the Forest Plan did not receive sufficient "local" public involvement and that . . . "the Forest Service went to every effort to evade this responsibility" (SOR, page 93).

The Forest Service agrees that public involvement is a key element of NFMA and takes its public involvement responsibilities very seriously. The statue itself includes requirements for public review of draft Forest Plans. The Secretary has published regulations establishing the public involvement requirements applicable to development of Forest Plans (36 CFR 219.6 and 219.10(b)). As explained below, the Forest complied with these requirements during preparation of the Forest Plan. Appellants' characterization of the public involvement responsibilities is not consistent with the Secretary's interpretation.

The Wayne Forest Plan was developed with substantial public involvement, including providing opportunity for discussion of concerns and issues relating to management of the Forest by publics living within and near the Forest. The public involvement steps taken during development of the Forest Plan are identified in the Draft EIS in Appendix A. Those steps include publication of notices in the Federal Register and local newspapers. The draft Forest Plan was circulated to all those

who requested to be on the mailing list. The Final EIS contains a response to all of the comments received on the draft plan and EIS in chapter 2. By regulation, the Forest planning records created during the development of the Forest Plan are public documents and are to be made available to the public (36 CFR 219.10(h) and 219.6(j)). There can be no doubt that the Forest Service provided adequate opportunity for public involvement in the development of the Forest Plan, including identification of local issues concerns and opportunities to be addressed in the planning process.

Conclusion on Issue:

The Regional Forester is affirmed. The planning documents provide sufficient information to conclude that the character and nature of the local economy were factors in the decision to approve the Forest Plan and that positive effects to the local economy are projected from implementation of the Forest Plan.

APPENDIX F

No. 94-3407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SIERRA CLUB, ET AL.,	) [Filed
	) Apr 07 1997
Plaintiffs-Appellants,	) Leonard Green,
	) Clerk]
v.	)
	) **ORDER**
JACK WARD THOMAS, ET AL.,	)
	)
Defendants-Appellees,	)
	)
OHIO FORESTRY ASSOCIATION, INC.,	)
	)
Intervening Defendant-Appellee.	)
	)

BEFORE: MARTIN, Chief Judge; BATCHELDER, Circuit Judge; and COOK,* District Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a

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* Hon. Julian A. Cook, Jr., Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

vote on the suggestion for rehearing en banc, the petitions for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club and Citizens Council on Conservation and Environmental Control, Plaintiffs,	:	[Filed March 18, 1992]
vs.	:	Case No. C2-92-249
F. Dale Robertson, in his capacity as Chief of the United States Forest Service, Edward Madigan, in his capacity as the Secretary of Agriculture, Floyd J. Marita, in his capacity as Regional Forester, Eastern Region, and Francis J. Voytas, in his capacity as Forest Supervisor, Defendants.	:	Judge Graham Magistrate Judge Abel COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. The court has jurisdiction pursuant to 28 U.S.C. sections 1331 and 2201, this being an action to preserve and protect the resources and wildlife of the Wayne National Forest under the Forest and Rangeland Renewable Resources

Planning Act of 1974, as amended by the National Forest Management Act of 1976, Title 16 U.S.C. section 1600 et seq.; the Multiple-Use Sustained-Yield Act of 1960, Title 16 U.S.C. section 528 et seq.; the National Environmental Policy Act, particularly Title 42 U.S.C. section 4332 and the Administrative Procedure Act, Title 5 U.S.C. sections 553 and 701 et seq.

PARTIES

2. The plaintiff, the Sierra Club, is a non-profit public interest organization concerned with preserving the Wayne National Forest (hereinafter, "Forest" or "Wayne") while enhancing its recreational, wildlife and other values through proper planning and management. The plaintiff Sierra Club is organized under the laws of California and has its principal place of business in California. The Sierra Club has 619,419 members nationally and its Ohio chapter had 17,647 members as of June, 1991.

3. The plaintiff, Citizens Council on Conservation and Environmental Control, is a non-profit unincorporated association concerned with preserving the Wayne while enhancing its recreational, wildlife and other values through proper planning and management. The Council's membership resides in Athens County and Hocking County, Ohio.

4. Members of the plaintiffs, especially in Ohio, regularly visit the Wayne for recreational purposes including hiking, bird watching and camping. Members also visit the Forest for their avocational, occupational and professional interests including scientific and scholarly pursuits. Members visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting

or other forms of logging of trees as a result of the defendants' unlawful practices regarding below cost timber sales.

5. The plaintiffs and their members have an interest in the enforcement and administration of the above-named Acts that extends beyond the generalized interest that all members of the public have in enforcement of the law. Final administrative actions of the Forest Service, taken in contravention of existing law, work a direct injury upon the plaintiffs and their members by allowing damaging illegal and inefficient use of natural resources in national forest areas. Such actions by the defendants result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne.

6. Defendants F. Dale Robertson, Floyd J. Marita, Edward Madigan and Francis Voytas are sued in their official capacities. Defendant Marita is the Regional Forester for the Eastern Division of the Forest Service which includes the Forest. Defendant Marita issued the Record Decision approving the plan at issue in this case. Defendants Robertson and Madigan are the Chief of the United States Forest Service and the Secretary of Agriculture, respectively, who have responsibility for formulating and implementing Land and Resource Management Plans for the nation's national forests as well as ensuring that these plans and Forest Service actions comply with the law. Defendant Francis Voytas is the Forest Supervisor of the Wayne and has primary responsibility for implementing the plan, including the below-cost timber sales and clearcutting of old growth forest areas.

THE ADMINISTRATIVE APPEAL

7. On January 4, 1988, Defendant Marita issued a record decision adopting a ten year plan for the Forest as required by

Title 16 U.S.C. Section 1600 et seq. The decision followed a planning process beginning in 1986 in which the plaintiff, through its Ohio Chapter, and other similarly interested parties submitted comments and proposals to the Forest Supervisor regarding the plan favored and eventually adopted by the defendants.

8. While minor adjustments in the plan were made in response to the comments of the plaintiff and others, the most serious objections raised during the planning process were disregarded and not adequately addressed in the final plan as adopted by defendant Marita in his decision of January 4, 1988.

9. The plan adopted by defendant Marita, as subsequently approved, controls all management and policy decisions for the Forest until a subsequent plan is approved as a matter of law. As a matter of practice the current plan will significantly and materially impact on future planning processes as a reference point for any future plans. The implementation of the plan will, of necessity, affect future options.

10. On February 16, 1988, the plaintiff Sierra Club appealed defendant Marita's decision to defendant Robertson pursuant to the applicable regulations. On November 14, 1990, the appeal was denied and the plan affirmed. Defendant Robertson's decision became a final administrative decision of the Department of Agriculture when defendant Madigan elected not to review the matter within ten days of its receipt.

11. On February 18, 1988, plaintiff, the Citizen's Council, appealed defendant Marita's decision to defendant Robertson pursuant to the applicable regulations. On April 15, 1988, the Council submitted its statement of reasons in support of its appeal. Defendant Marita did not file the required

responsive statement to the plaintiff Council's submission until May 4, 1989, over a year later. On May 27, 1989, the plaintiff Council filed its reply to defendant Marita's responsive statement, completing the administrative record for the appeal. Thereafter, the defendant Robertson failed and refused to issue a final decision on the appeal.

12. On September 25, 1991, the plaintiff Council wrote the defendant demanding a decision. On November 12, 1991, defendant Robertson, through his agent, responded that a decision could be expected within 45 days. As of the date of filing of this action, no decision was rendered, even though almost three years have elapsed since the appeal record was completed. Upon information and belief, the defendants have implemented portions of the plan during the pendency of the Council's appeal. The actions of the defendants in continuing to fail and refuse to render a decision constitutes a denial of the Council's appeal.

FACTS

13. The Wayne National Forest unit includes within its boundaries 832,603 acres, but only 202,967 acres of the area is National Forest belonging to the federal government as the Forest unit boundaries contain land belonging to both the private and public sector of Ohio.

14. Located in the hill country of southeastern Ohio, the Wayne's lands are characterized by narrow ridge tops, steep slopes and narrow valleys. These characteristics make much of the Wayne physically and economically unsuitable for timbering, particularly clearcutting which involves cutting all saleable and unsaleable trees in large tracts within designated management areas of the Forest. These characteristics adversely affect the cost and difficulty of building the roads

necessary for the cutting and removal of the trees as well as the degree of damage caused by erosion and water run-off associated with clearcutting and road construction in forests.

15. Public lands available for recreation comprise less than 4% of the State of Ohio. Although it is one of the smaller national forests in the country, the Wayne comprises 24% of the public land with wildlife value in this state.

16. The Wayne represents one of the few areas of relatively extensive, continuous forest growth in Ohio and contains a substantial portion of the old-growth forest in the state. The defendants' own studies indicate that there will be an overall loss in forest wildlife habitat in the State as a whole in the future.

17. Under the forest plan adopted by the defendants, almost seventy per cent (70%) of the Wayne has been designated as suitable for timber production. The plan authorizes sale of 75 million board feet over the life of the plan with an annual allowable sale quantity of 7.5 million board feet.

18. The primary method under the plan for taking the forest's trees for sale is clearcutting, a method disfavored by law and regulation and subject to special requirements particularly when undertaken in connection with below cost timber sales. The plan reserves approximately 120,000 acres for so-called even-aged management, mostly clearcutting. Upon information and belief, this represents 80% of the timber base.

19. To facilitate the timber removal the plan allows construction of 8.8 miles of new permanent roads annually along with 6.4 miles of temporary roads per year.

20. Because of the extensive private and state holdings within the boundaries of the Wayne, there already exist approximately 300 miles of state, county and township roads within the Forest. In addition there are approximately 250-300 miles of mineral access roads along with 500 to 1,000 miles of unsurfaced roads. All of these roads are exclusive of roads built by the Forest Service. The defendants failed to adequately consider the extensive roaded areas on private and state lands which coexist with the Wayne. The defendants failed to adequately consider the cumulative environmental and visual impact of the planned new road construction.

21. The timber sales under the plan approved by the defendants are below cost sales. Taxpayers are subsidizing the sale of timber from the Wayne to commercial interests because the defendants are unreasonably, unnecessarily and arbitrarily permitting excessive timbering of the Forest at a loss to the government.

22. In Fiscal Year 1987 total revenues for timber sales in the Wayne were $480,876 while expenses and payments to the states totaled $718,525. In that fiscal year revenues were approximately 67% of costs. In fiscal Year 1988, revenues were $858,017 while expenses and state payments were $1,192,850 meaning revenues were only 72% of costs that year. In fiscal year 1989 revenues were $838,366 while expenses and state payments were $1,074,113 meaning revenues were only 78% of costs that year. Similarly, in fiscal year 1990 revenues were $469,751 while expenses and state payments were $632,757 meaning revenues were 74% of costs.

23. The plan adopted by the defendants is unlawful and arbitrary and capricious because, among other reasons:

(a) the plan places the objective of timber harvesting above all other uses;

(b) the plan fails to meet the "suitability" requirement for timber harvest planning by designating economically and environmentally unsuitable lands for timbering;

(c) the plan lacks site-specific determinations that clearcutting is the "optimal" method of harvesting timber in the Wayne;

(d) the plan fails to demonstrate the optimality of clearcutting as the method of harvesting timber for the Wayne as a whole;

(e) the plan fails to demonstrate that timber harvest will be cost effective and omits any site specific analysis to determine cost effectiveness;

(f) the plan fails to demonstrate that the non-timber use benefits alleged to be achieved through the timber program are really needed.

24. The defendants, arbitrarily and unlawfully, attempted in the plan to justify below cost timber sales by assigning a positive economic value to certain alleged non-economic intangible benefits, particularly wildlife diversity, purportedly associated with the timbering allowed by the plan.

25. The defendants represent in the plan that the timber harvest will benefit wildlife diversity by increasing the early successional habitat (characterized by younger growth, more open uncanopied areas and edging) within the federally-owned portions of the Wayne. This, according to the plan, will promote certain types of wildlife associated with early successional habitats.

26. The defendants arbitrarily and unlawfully disregarded the conditions surrounding the federal holdings in the Wayne which were disclosed in the planning documents as well as the administrative process.

27. Currently, mature, old growth forest with continuous unopen canopy is in short supply in Southeastern Ohio and the rest of the state. The maturing, natural forest areas in the Wayne provide much needed habitat for numerous plant and animal species requiring late successional conditions.

28. There is already an ample supply of early successional habitat in the area of and around the Wayne. Wildlife that requires early successional conditions are overly abundant in the region, a case in point being the white tailed deer. The defendants' planning documents disclose that 131,544 acres of the non-federal land in the area are in pasture, a habitat similar to early successional, whereas 170,220 acres of federal lands are in forest (at various stages of maturity). 77% of the federal lands in the Wayne would have to be deforested to achieve the same amount of open habitat that already exists in the surrounding area.

29. The defendants' failure to properly consider the lands surrounding the Wayne in assigning positive economic values to intangible benefits purportedly to be gained from clearcutting was arbitrary and a major plan defect. The planning deficiency was worsened by the absence of any data derived from study of the Wayne itself pertaining to wildlife and recreation values.

30. The estimated values in the planning documents relating to wildlife and recreation used to justify below-cost sales were not adjusted for local recreational conditions on the Wayne. Instead, values applicable to the 20-state Eastern

Region of the Forests Service were used. The Eastern Region stretches from the Maine Woods to the Ozarks, from the Boundary waters to the Chesapeake Bay. An index of demands for the Region as a whole cannot accurately reflect the local circumstances surrounding the Wayne.

31. Aside from arbitrarily and capriciously assigning positive economic values to the effects of timbering on biological diversity and recreation, the defendants failed to adequately consider or value the detrimental effects of the below-cost timber sales on these and other uses of the Forest which by law are to be given equal weight with timber production.

32. The defendants' plan will actually reduce wildlife diversity by allowing timbering, particularly clearcutting, to disrupt, reduce and fragment the late successional, old growth forest available in Ohio while adding to the overabundance of early successional habitat in the Wayne area.

33. The defendants' plan will actually reduce recreational opportunities in the Wayne. Currently, the Wayne only meets 40% of the demand for primitive forest. The plan adopted by the defendants will reduce the availability of primitive forest.

34. The defendants' plan also arbitrarily assigns positive values for alleged benefits to the local economy from below-cost timber sales. In fact, the plans for below-cost timber sales are detrimental to the local economy which increasingly benefits from tourism associated with the Wayne. The Wayne constitutes a unique recreational opportunity for Ohio and it is ideally located for access by those living in Ohio's major urban areas.

35. In Southeast Ohio the use of land for urban and agricultural purposes has been accompanied by exploitation for purposes of mineral extraction and timbering. Large sections of land have been devoted to strip mining; oil and gas development has also expanded greatly in the past decade. Timber production has occurred on both public and private lands. Despite liberal use of the land in Southeast Ohio for these primary industries, the regional economy is among the worst in the State. Extraction and exploitation have not proven to be reliable sources of stable income or employment. Yet, in disregard of these facts, the defendants justify the below cost sale of timber, in part, as purportedly necessary for the local economy. The defendants know or should know that preservation of the timber base by limiting below cost timbering will better serve the local economy. The unique recreational opportunities offered by the Wayne's mature old growth forest will provide greater economic benefits to the local community.

36. The mineral exploitation in the area of the Wayne has already severely and adversely affected the water supply in the region. The clearcutting under the plan and associated road building will cause increased water run-off during periods of heavy rains and result in increased sedimentation adversely affecting the watershed. The plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plans' impact on water resources. Watershed protection is lacking in the plan as is sufficient discussion of whether there is any current technology which can mitigate the plans' effect on water resources.

37. The plan and its environmental impact statement fails even to assess the cumulative impact of the extensive coal

mining, particularly strip mining, which has been permitted in and around the Wayne for many years.

FIRST CLAIM FOR RELIEF

38. Paragraphs one through thirty-four are realleged and incorporated herein.

39. The actions of the defendants in approving the plan for the Wayne and in directing or permitting below-cost timber sales accomplished by means of clearcutting are in violation of the provisions of federal law enumerated in paragraph one of this complaint. The actions of the defendants threaten imminent and irreparable harm to plaintiff's interests in the use and enjoyment of national and wilderness resources and plaintiff's interests can only be protected by a declaration that the existing plan for the Wayne is inconsistent with law accompanied by an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law.

SECOND CLAIM FOR RELIEF

40. Paragraphs one through thirty-six and realleged and incorporated herein.

41. All of the public lands held by the federal government, including the national forests, are held in trust for the people of the United States. This trust responsibility extends to agencies which administer federal governmental policies and programs concerning such public lands.

42. The defendants' actions in directing or permitting below-cost timber sales in the Wayne under the plan violate the defendants' duties as public trustees.

WHEREFORE, the plaintiff requests:

a) that the Court declare that the plan adopted by the defendants is unlawful as are the below-cost timber sales and timbering, including clearcutting, authorized by the plan; and

b) that the Court issue a preliminary and permanent injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan has been revised in accordance with law, subject to public and administrative review; and

c) that the plaintiff recover from the defendants its costs, including reasonable attorneys fees, as provided for under the Equal Access to Justice Act, Title 28 U.S.C. section 2412(D) and any other applicable law; and

d) that the Court order such other further relief as may be appropriate.

Respectfully submitted,

/s/Frederick M. Gittes
Frederick M. Gittes (GIT02)(0031444)
SPATER, GITTES, SCHULTE & KOLMAN
723 Oak Street
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APPENDIX H

CONSTITUTIONAL PROVISIONS

Article III, Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

* * * * *

Article IV, Section 3. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

* * * * *

STATUTORY PROVISIONS

The 1897 Organic Administration Act provides in 16 U.S.C. 475 that:

§ 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1987, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * *

The current version of 16 U.S.C. 500 provides:

§ 500. Payment and evaluation of receipts to State or Territory for schools and roads; moneys received; projections of revenues and estimated payments

On and after May 23, 1908, twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State or Territory in which such national forest is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such

national forest is situated: *Provided*, That when any national forest is in more than one State or Territory or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by this section shall be based upon the stumpage value of the timber. Beginning October 1, 1976, the term "moneys received" shall include all collections under the Act of June 9, 1930, and all amounts earned or allowed any purchaser of national forest timber and other forest products within such State as purchaser credits, for the construction of roads on the National Forest Transportation System within such national forests or parts thereof in connection with any Forest Service timber sales contract. The Secretary of Agriculture shall, from time to time as he goes through his process of developing the budget revenue estimates, make available to the States his current projections of revenues and payments estimated to be made under the Act of May 23, 1908, as amended, or any other special Acts making payments in lieu of taxes, for their use for local budget planning purposes.

* * * * *

The Multiple-Use Sustained-Yield Act of 1960, as currently codified in 16 U.S.C. 528-31, provides:

§ 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; Congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The

purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

§ 529. Authorization of development and administration; consideration to relative values of resources; areas of wilderness

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title.

§ 530. Cooperation for purposes of development and administration with State and local government agencies and others

In the effectuation of sections 528 to 531 of this title and the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

§ 531. Definitions

As used in sections 528 to 531 of this title the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources; each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greater dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

* * * * *

The Knutsen-Vandenberg Act and related Acts, as currently codified in 16 U.S.C 576-76d, provide:

§ 576. Reforestation; establishment of forest tree nurseries; tree planting; seed sowing and forest improvement work

The Secretary of Agriculture is authorized to establish forest tree nurseries and do all other things needful in

preparation for planting on national forests on the scale possible under the appropriations authorized by section 576a of this title: *Provided*, That nothing in this section shall be deemed to restrict the authority of the said Secretary under other authority of law.

§ 576a. Authorization of appropriation for reforestation

There is authorized to be appropriated for each fiscal year after year ending June 30, 1934, not to exceed $400,000, to enable the Secretary of Agriculture to establish and operate nurseries, to collect or to purchase tree seed or young trees, to plant trees, and to do all other things necessary for reforestation by planting or seeding national forests and for the additional protection, care, and improvement of the resulting plantations or young growth.

§ 576b. Purchasers of national-forest timber; deposits of money in addition to payments for timber; use of deposits; seedlings and young trees for burned-over areas in national parks

The Secretary of Agriculture may, when in his judgment such action will be in the public interest, require any purchaser of national-forest timber to make deposits of money, in addition to the payments for the timber, to cover the cost to the United States of (1) planting (including the production or purchase of young trees), (2) sowing with tree seeds (including the collection or purchase of such seeds), (3) cutting, destroying, or otherwise removing undesirable trees or other growth, on the national-forest land cut over by the purchaser, in order to improve the future stand of timber, or (4) protecting and improving the future productivity of the renewable resources of the forest land on such sale area, including sale area improvement operations, maintenance and

construction, reforestation and wildlife habitat management. Such deposits shall be covered into the Treasury and shall constitute a special fund, which is appropriated and made available until expended, to cover the cost to the United States of such tree planting, seed sowing, and forest improvement work, as the Secretary of Agriculture may direct: *Provided*, That any portion of any deposit found to be in excess of the cost of doing said work shall, upon the determination that it is so in excess, be transferred to miscellaneous receipts, forest reserve funds, as a national-forest receipt of the fiscal year in which such transfer is made: *Provided further*, That the Secretary of Agriculture is authorized, upon application of the Secretary of the Interior, to furnish seedlings and/or young trees for replanting of burned-over areas in any national park.

§ 576c. Supplemental National Forest Reforestation Fund; establishment; duration; authorization of appropriations

Notwithstanding any other provision of law, the Secretary of Agriculture shall establish a "Supplemental National Forest Reforestation Fund", and transfer to that fund beginning with the fiscal year commencing July 1, 1972, and ending on September 30, 1987, such amounts as may be appropriated therefor. There is hereby authorized to be appropriated for such purpose for each of the fiscal years during such period the sum of $65,000,000.

§ 576d. Expenditure of Supplemental National Forest Reforestation Fund moneys; availability of moneys from other sources unaffected

Moneys transferred to the National Forest Reforestation Fund under the provisions of sections 576c to 576e of this title shall be available to the Secretary of Agriculture, for

expenditure upon appropriation, for the purpose of supplementing programs of tree planting and seeding of national forest lands determined by the Secretary to be in need of reforestation. Such moneys shall be available until expended, and shall be provided without prejudice to appropriations or funds available from other sources for the same purposes, including those available pursuant to section 576b of this title.

* * * * *

Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by Section 6 of the National Forest Management Act of 1976 and currently codified at 16 U.S.C. 1604, provides:

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance and revision by Secretary of Agriculture as part of Program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to

achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by the Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976 and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans--

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of Title 5 promulgate regulations, under the principles of Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to—

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 [42

U.S.C. 4321 et seq.], including, but not limited to, direction on when and for what plans an environmental impact statement required under section 102(2)(C) of that Act [42 U.S.C. 4332(2)(C)] shall be prepared;

(2) specifying guidelines which—

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which—

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the

diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;

(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned;

(E) insure that timber will be harvested from National Forest System lands only where—

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams; streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands only where—

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would

approve the harvest proposal: *Provided*, That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

(iv) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

(h) Scientific committee to aid in promulgation of regulations; termination; revision committees; clerical and technical assistance; compensation of committee members

(1) In carrying out the purposes of subsection (g) of this section, the Secretary of Agriculture shall appoint a committee of scientists who are not officers or employees of the Forest Service. The committee shall provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted. The committee shall terminate upon promulgation of the regulations, but the Secretary may, from time to time, appoint similar committees when considering revisions of the regulations. The views of the committees shall be included in the public information supplied when the regulations are proposed for adoption.

(2) Clerical and technical assistance, as may be necessary to discharge the duties of the committee, shall be provided from the personnel of the Department of Agriculture.

(3) While attending meetings of the committee, the members shall be entitled to receive compensation at a rate of $100 per diem, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5 for persons in the Government service employed intermittently.

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

(j) Effective date of land management plans and revisions

Land management plans and revisions shall become effective thirty days after completion of public participation and publication of notification by the Secretary as required under subsection (d) of this section.

(k) Development of land management plans

In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary, and shall assure that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands for a period of 10 years. Lands once identified as unsuitable for timber production shall continue to be treated for reforestation purposes, particularly with regard to the protection of other multiple-use value. The Secretary shall review his decision to classify these land as not suited for timber production at least every 10 years and shall return these lands to timber production whenever he determines that conditions have changed so that they have become suitable for timber production.

(l) Program evaluation, process for estimating long-term costs and benefits; summary of data included in annual report

The Secretary shall—

(1) formulate and implement, as soon as practicable, a process for estimating long-terms[1] costs and benefits to support the program evaluation requirements of this subchapter. This process shall include requirements to provide information on a representative sample basis of estimated expenditures associated with the reforestation, timber stand improvement, and sale of timber from the National Forest System, and shall provide a comparison of

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[1] So in original. Probably should be "long-term."

these expenditures to the return to the Government resulting from the sale of timber; and

(2) include a summary of data and findings resulting from these estimates as a part of the annual report required pursuant to section 1606(c) of this title, including an identification on a representative sample basis of those advertised timber sales made below the estimated expenditures for such timber as determined by the above cost process; and

(m) Establishment of standards to ensure culmination of mean annual increment of growth; silvicultural practices; salvage harvesting; exceptions

The Secretary shall establish—

(1) standards to insure that, prior to harvest, stands of trees throughout the National Forest System shall generally have reached the culmination of mean annual increment of growth (calculated on the basis of cubic measurement or other methods of calculation at the discretion of the Secretary): *Provided*, That these standards shall not preclude the use of sound silvicultural practices, such as thinning or other stand improvement measures: *Provided further*, That these standards shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack; and

(2) exceptions to these standards for the harvest of particular species of trees in management units after consideration has been given to the multiple uses of the

forest including, but not limited to, recreation, wildlife habitat, and range and after completion of public participation processes utilizing the procedures of subsection (d) of this section.